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VOL. 65—INDIANA REPORTS.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By AUGUSTUS N. MARTIN,
OFFICIAL REPORTER.

VOL. LXIII,

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1878,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. GEORGE V. HOWK.*†

HON. WILLIAM E. NIBLACK.†

HON. JAMES L. WORDEN.†

HON. SAMUEL E. PERKINS.†

HON. HORACE P. BIDDLE.‡

***Chief Justice at November Term, 1878.**

†Term of office commenced January 1st, 1877.

‡Term of office commenced January 4th, 1875.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
GABRIEL SCHMUCK.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
FREDERICK HEINER.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1878, IN THE
SIXTY-THIRD YEAR OF THE STATE.

HARNESS ET AL. v. HARNESS ET AL.

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PARTITION. — Advancement. — Counter-Claim. — Supplemental Pleading. — Death of Party. — Descents.—In an action for the partition of the lands of an intestate, brought by his widow and some of his children, against the other children, wherein the defendants were charged with advancements in full of their interests in such lands, the defendants filed what they called a supplemental paragraph “of answer,” alleging the death of one of such co-plaintiffs, without issue, since the commencement of the action, and asking that that fact be considered in making the partition.

Held, on demurrer, that the so-called paragraph of answer was not an answer but a counter-claim, and was sufficient.

SAME. — Judgment. — Decree.—A decree of partition in such action, setting off a portion of the lands to such deceased child, and awarding nothing to the defendants, where the evidence established the facts alleged in the counter-claim, was a nullity.

From the Howard Circuit Court.

N. R. Lindsay, M. Bell and M. McDowell, for appellants.

D. Turpie and H. D. Pierce, for appellees.

NIBLACK, J.—This was a suit by Louisa Harness, Sarah

Harness et al. v. Harness et al.

J. Harness, Addison A. Harness, Mary E. Harness, Ida M. Harness, Rosa D. Harness, Margaret Harness and Thomas Harness, against Benjamin F. Harness, William W. Harness and Lewis W. Harness, for the partition of certain lands, of which Andrew J. Harness died seized; the said Louisa being the widow, and the other parties being the children, of the deceased.

It was charged in the complaint, that the deceased had, in his lifetime, purchased real estate for his said sons, William and Lewis, of the value of four thousand dollars for each, and had caused the same to be conveyed to them respectively, as an advancement in full of their shares in his estate.

This action was here once before, when the judgment was reversed, and the cause was remanded for further proceedings. See *Harness v. Harness*, 49 Ind. 384.

After the cause was remanded, and before the last trial, the defendants William W. Harness and Lewis W. Harness answered jointly, amongst other things, in the form of an alleged supplemental paragraph, that, since the commencement of the suit, the said Ida M. Harness, one of the plaintiffs, had died without issue, by reason of which the said Louisa, her mother, had become entitled to one-half of the said Ida's interest in the real estate in suit, and the other parties in the action had become entitled, as her brothers and sisters, to the other half of her said interest, and asked that the matters set up by them might be taken into consideration in making partition as prayed for by the plaintiffs, and for all other relief.

The plaintiffs demurred to this paragraph of the answer, as it was called, for want of sufficient facts, and the court sustained the demurrer.

Upon the trial, a verdict was returned for the plaintiffs, and that the defendants William W. Harness and Lewis W. Harness had received advancements amounting to four thousand dollars each.

After overruling a motion for a new trial, the court decreed partition of the land described in the complaint, directing one-third in value thereof to be set apart to the widow, and the remaining two-thirds in severalty to the remaining plaintiffs, including the said Ida, and to the defendant Benjamin F. Harness, and excluding the defendants William W. and Lewis W. Harness; also appointing commissioners to make partition in accordance with said decree of partition. These commissioners made partition of the lands accordingly, setting apart a share to each of the parties decreed to be entitled to the same in severalty, including the said Ida, which partition was approved and confirmed by the court.

There seems to be a great deal of confusion in the minds of the profession as regards the difference between an answer in bar and a counter-claim; and in a great many, if not in the greater number, of the cases in which a counter-claim is pleaded, it is styled an answer, or a paragraph of an answer, in utter disregard of the rule of practice, which will not permit a single pleading to perform the double office of an answer and a counter-claim.

But, in determining the character of a pleading, we have to look to the substance of it, rather than to its merely formal parts, or to the name which the pleader has given it.

Judged by this criterion, the pleading filed, as above set forth, by the defendants William W. Harness and Lewis W. Harness, as a paragraph of answer, was, in substance, a counter-claim, and must be so considered by us in passing upon its sufficiency.

A state of facts was averred in the complaint going to show that two of the defendants had no interest in the lands sought to be divided. These defendants set up, in a pleading, that since the commencement of the suit one of the plaintiffs had died, by which each one of them had inherited an interest in such lands, which facts they asked

May v. Pavey et al.

might be taken into consideration in making the partition prayed for by the plaintiffs.

This, we think, was setting up new matter, arising out of the cause of action, upon which affirmative relief was demanded in such a way as to constitute a valid counter-claim.

In our opinion, therefore, the court erred in sustaining the demurrer to the counter-claim set up by the said William W. Harness and Lewis W. Harness, as above set out.

It was made to appear upon the trial by the evidence, that the said Ida M. Harness, referred to in the counter-claim, had died since the commencement of the suit, and before the trial; but no notice of the change of parties, thus necessarily brought about by her death, was taken, either by an amendment of the complaint, or in the verdict of the jury, or in the decree of partition. The verdict, being in favor of all the plaintiffs, including the said Ida, it was not sustained by sufficient evidence. A new trial ought, for that reason, if for no other, to have been granted.

In consequence of the death of the said Ida, so much of the decree as directed a portion of the lands to be set off to her was a nullity.

Other objections are urged by counsel to the proceedings below, but, as the judgment must, at all events, be reversed for the errors already pointed out, we deem it unnecessary to further extend this opinion.

The judgment is reversed, at the costs of the appellee, and the cause remanded for further proceedings.

MAY v. PAVEY ET AL.

PLEADING.—Practice.—Harmless Error.—The sustaining of a demurrer to a paragraph of a pleading is harmless, where the matters alleged therein are admissible in evidence under a remaining paragraph.

May v. Pavey et al.

REPLEVIN.—Evidence.—In replevin, evidence of ownership in the defendant may be given under the general denial.

BILL OF EXCEPTIONS.—Supreme Court.—Evidence.—Instructions.—The Supreme Court, on appeal, will not consider the evidence nor the instructions to the jury, unless it affirmatively appear by the bill of exceptions that it contains all the evidence.

From the Bartholomew Circuit Court.

F. T. Hord, for appellant.

R. Hill, for appellees.

BIDDLE, J.—Complaint in replevin, by the appellees, against the appellant, to recover the possession of a roan horse.

Answer, general denial, and a second and third special paragraphs.

The second paragraph denies the ownership of the horse in the appellees, in an argumentative form, and avers property in the appellant.

The third paragraph avers ownership of the horse in the appellant, and demands judgment for the return of the property and fifty dollars damages.

Trial by jury; verdict and judgment for appellees.

Motion for a new trial overruled; exceptions; appeal.

Separate demurrers were filed to the second and third paragraphs of answer, for the alleged want of facts sufficient to constitute a defence. The demurrer to the second paragraph was overruled; the demurrer to the third was sustained, and exceptions duly reserved.

The appellant is of the opinion that it was an error to sustain the demurrer to the third paragraph of answer, and discusses the question in his brief. We do not very carefully consider the question. There was no fact alleged in the third paragraph that could not have been given in evidence under the second, and perhaps none that might not have been given under the general denial. The error complained of, therefore, if it was error, after trial upon

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the issue of the general denial, and the second paragraph of answer, became harmless, and now affords no ground for the reversal of the judgment. And all the matter set up in the replies could have been given in evidence under the general denial to the second paragraph of the answer. *Conner v. Comstock*, 17 Ind. 90.

The parties in their briefs discuss various questions arising upon the admission and rejection of evidence at the trial, and upon the instructions given to the jury by the court; but the record nowhere informs us that all the evidence introduced in the case is in the bill of exceptions: and without this, of course, the questions so carefully examined by the counsel have no basis to stand upon. In reviewing the whole record, as it comes to us, we can discover no available error.

The judgment is affirmed, at the costs of the appellant.

TITLOW ET UX. v. HUBBARD.

PROMISSORY NOTE.—*Reference to Conditions of Another Writing.*—*Complaint.*

—*Copy.*—A promissory note upon which suit was brought, and which was alleged in the complaint to be due and unpaid, contained a stipulation that it was "subject to certain conditions contained in a written agreement" between the parties, bearing the same date as the note.

Held, on demurrer, that such agreement ought to have been made part of the complaint by copy.

Held, also, the complaint containing no averment concerning such agreement or its conditions, that it is insufficient.

From the Carroll Circuit Court.

J. Applegate, for appellants.

NIBLACK, J.—Erastus W. Hubbard brought this action against Aaron Titlow and Sophia J. Titlow, his wife, to foreclose a mortgage on certain real estate.

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The complaint averred, that the said Aaron Titlow, on the 20th day of April, 1871, executed to the said Hubbard his promissory note for the sum of two thousand five hundred dollars, payable on or before the 20th day of April, 1875, with ten per cent. interest, to be paid annually, and reasonable attorney's fees, and without relief from valuation laws; and that, to secure the payment of said promissory note, the defendants executed, on the same day, a mortgage on certain real estate, specifically described in said mortgage, copies of which said note and mortgage were filed with the complaint.

The complaint also averred that said note was due and remained unpaid.

Wherefore judgment was demanded against the said Aaron Titlow, upon said note, and against both of the defendants, for the foreclosure of said mortgage.

Aaron Titlow demurred to the complaint, for want of sufficient facts, but his demurrer was overruled. Sophia J. Titlow made default.

The court trying the cause made a finding for an amount as due upon the note for principal, interest and attorney's fees, and rendered judgment for said amount against the said Aaron Titlow, and against both the defendants, for a foreclosure of the mortgage.

Upon the assignment of errors upon the record, the first question which arises, in its natural order, is that of the sufficiency of the complaint.

The copy of the note, filed with the complaint, was as follows:

“ \$2,500.

DELPHI, APRIL 20th, 1871.

“ On or before the 20th day of April, 1875, I promise to pay E. W. Hubbard or order the sum of twenty-five hundred dollars, with ten per cent. interest, payable annually, and attorney's fees if prosecuted for collection thereof, waiving valuation laws in the collection thereof, subject to cer-

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tain conditions contained in a written agreement of this date between parties hereto. A. TITLOW."

This note, as it is called, shows upon its face that it was but one of two instruments in writing, which together constituted one entire agreement between the parties concerning the payment of the money to which it relates. The plain inference, from its language, is, that this other agreement in writing between the parties, to which it refers, constituted as much a portion of the foundation of the action as did the note itself. This other agreement in writing, or a copy of it, ought, therefore, also to have been filed with the complaint. 2 R. S. 1876, p. 73, sec. 78; also note 1 on the same page; *Stafford v. Davidson*, 47 Ind. 319.

It is an essential requisite of a promissory note that there must be certainty as to the fact of payment. It must be payable at all events, and not dependent upon a condition or contingency. Chitty Bills, 134; 1 Parsons Notes & Bills, 42.

The obligation, therefore, above set out, is not technically a promissory note, but an agreement, in writing, to pay money, subject to certain conditions which are not contained in the instrument itself, and which are not disclosed by any averment of the complaint.

Such an instrument, standing by itself and unaided by suitable explanatory averments, did not, we think, constitute a sufficient foundation for an action. It was, by its terms, too indefinite and uncertain to authorize a demand of judgment upon it.

In any view which we are able to take of the complaint, it appears to us to have been bad upon demurrer.

As the judgment will have to be reversed, for want of a sufficient complaint, it is unnecessary for us to review any of the proceedings subsequent to the overruling of the demurrer to the complaint.

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The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint.

DICKSON ET AL. v. THE INDIANAPOLIS COTTON MANUFACTURING COMPANY.

CONTRACT BY COPARTNERSHIP.—*Effect of Dissolution of Copartnership.—Abandonment of Contract.—Rescission.—Set-Off.—Pleading.*—In an action against the members of a copartnership as such, to recover for goods sold and delivered by the plaintiff to the defendants, wherein the latter answered asking damages, by way of set-off, for alleged breaches by the plaintiff of a contract in writing, entered into between the plaintiff and the defendants as such copartners, which contract was to continue for a specified term of years, the plaintiff replied, alleging, that, after the execution of the contract and before its expiration, such copartnership had ceased to exist, thereby working an abandonment of the contract by the defendants; and also alleging, that, prior to such dissolution, the plaintiff had fully performed his part of the contract.

Held, on demurrer, that such contract, though entered into by the defendants in their copartnership name, was the joint contract of all the defendants.

Held, also, that the dissolution of the co-partnership did not work an abandonment of the contract, nor authorize the plaintiff to treat it as rescinded.

Held, also, such copartnership not having been dissolved by the death of any of its members, that the defendants have the right to perform their stipulations, under the contract, and to receive the benefits thereof.

Held, also, that the reply is insufficient.

From the Marion Superior Court.

J. Buchanan, M. B. Williams and C. D. Whitehead, for appellants.

B. Harrison, C. C. Hines and W. H. H. Miller, for appellee.

WORDEN, J.—The Indianapolis Cotton Manufacturing Company sued the appellants for goods sold and delivered. Issue, trial, verdict and judgment for the plaintiff.

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The defendants, in the third paragraph of their answer, alleged as follows :

“ 3d Paragraph. Defendants above named, further answering herein, would show to the court, that, on the 14th day of November, A. D. 1878, these defendants, under the firm name and style of C. Dickson & Co., were engaged in the mill furnishing business, in the city of Indianapolis, Indiana; that, as such firm, they had a large and lucrative trade, to the amount of \$500,000 per year, in the sale of cotton warps and machinery and material of various kinds that were and are used by woollen mills in the manufacture of cloths of various kinds; that their said trade extended over a large extent of territory, including a number of the states of the Union; that they were purchasing their supplies for furnishing their customers from various mills other than the plaintiff's; that plaintiff at said date had then commenced the manufacture of warps at her mills, erected in the city of Indianapolis, Indiana, and at said time had not been able to obtain a market for her goods; that plaintiff solicited these defendants to give her the benefit of their said large and lucrative trade aforesaid, and solicited these defendants to introduce the merchandise of plaintiff into the market and among their customers; that defendants, on the said 14th day of November, 1868, at the instance and request of plaintiff, entered into a written agreement with plaintiff for the exclusive handling and sale of the manufactured articles of plaintiff, as specified in said contract; that said written agreement is filed herewith by copy marked ‘Exhibit C,’ and made a part of this paragraph of defendants’ answer; that, by a large outlay of money, and by much labor and time bestowed by these defendants, they introduced said plaintiff’s merchandise into the market, and built up a large and lucrative trade and demand for all of her good merchantable manufactured articles, as specified in said written agreement,

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within six to twelve months after the date of said agreement; that defendants have in all things fully performed their part of said contract in good faith, and still continue to perform their part, as stipulated in said agreement, and are prepared and willing to continue the same until the time of the expiration of the five years as specified in said agreement; that plaintiff has in all things failed to perform her said agreement; she has failed to furnish said defendants with warps, when demanded, according to said agreement; that she disregarded said contract in every part thereof; that, for the year ending November 14th, 1869, plaintiff sold to the customers of the defendants and others warps to the amount of four hundred thousand dollars, in violation of said agreement; that she sold in each of the years 1870, 1871, 1872, and up to the commencement of this action, in 1873, to wit, — day of September, 1873, warps to the amount of \$500,000 in each year; that plaintiff has failed and refused to account to defendants for the amounts due defendants upon said sales so made in violation of said contract; that defendants have often demanded of plaintiff a full accounting for all sales so made in violation of said agreement; that plaintiff damaged said defendants greatly in their general trade and business, by taking from them, in violation of said agreement, a large and lucrative trade in the goods and wares that were being sold by defendants, in the handling of said warps under the said agreement; that plaintiff failed to furnish good merchantable warps according to said agreement;—all of which has been to the damage of defendants in the sum of one hundred thousand dollars, up to the date of the commencement of this action; that defendants offer to set off against plaintiff's demand so much of said sum due them as may be due plaintiff on balance herein, and they pray judgment over, in the sum of fifty thousand dollars, for damages up to the commencement of this

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action by plaintiff, and ask that said contract be held a continuing contract, and be not merged in this action as to any damages accruing to defendants since the commencement of this suit."

"EXHIBIT C.

"This indenture witnesseth, that the Indianapolis Cotton Manufacturing Company has, this 14th day of November, 1868, bargained and agreed to give C. Dickson & Co., of Indianapolis, Ind., in consideration of C. Dickson & Co. selling only warps made by the above company, so far as they are able to furnish them, the exclusive sale of all warps manufactured by the said Indianapolis Cotton Manufacturing Company from time to time, for the period of five years from date hereof, excepting that they reserve the privilege of furnishing Messrs. C. E. Geisendorff & Co., of Indianapolis, all the warps they weave in their mills.

"The Indianapolis Cotton Manufacturing Company warrant all warps made by them to give satisfaction, and agrees to furnish them at the following list of prices, based upon strict middling cotton, at twenty-five cents per pound, in Cincinnati, O., markets:

"1200 end black warps No. 14 yarn $6\frac{1}{4}$, No. 16 yarn $5\frac{3}{8}$,

"1400 " " " " " " $7\frac{1}{4}$, " " " $6\frac{3}{8}$,

"1500 " " " " " " $7\frac{3}{4}$, " " " $6\frac{7}{8}$,

per yard, and one cent per yard to be added to above for blue;

"1800 end white warps No. 16 yarn $6\frac{7}{8}$,

"1800 " black " " " " $7\frac{7}{8}$,

"1800 " blue " " " " $8\frac{7}{8}$, per yard;

"1400 and 1500 end white warps one cent per yard, and 1200 end white warps three-fourths cent per yard, less than black warps.

"Other kinds and numbers of warps to be furnished in proportion to the above basis, and the prices of warps are to vary one-eighth ($\frac{1}{8}$) cent per yard for each

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advance or decline of one (1) cent per pound on cotton as stated above, and C. Dickson & Co. to receive as commissions for selling warps one-fourth ($\frac{1}{4}$) cent per yard, and one (1) dollar each for all sized warps sold, and five (5) per cent. off on all dressed warps sold.

“And it is further agreed by the Indianapolis Cotton Manufacturing Company, that, should it become necessary at any time to reduce the above named price list of warps in order to compete with other warp manufacturers, that they will do so, and that they will refill empty warp beams for C. Dickson & Co. without extra charge for the same.

“It is agreed on the part of C. Dickson & Co., in consideration of the Indianapolis Cotton Manufacturing Company giving them the exclusive sale of their warps, that they will give them the benefit of all customers for warps, so far as the Indianapolis Cotton Manufacturing Company are able to furnish warps, and to use due diligence in prosecuting sales of said warps; and they further agree to pay for all warps furnished them during any month within sixty-five days from the fifteenth day of the succeeding month. C. Dickson & Co. are to have the privilege of selling all warps purchased by them prior to this date, and to represent the company as agents for the sale of warps.

“Signed and executed at Indianapolis, Ind., this fourteenth day of November, 1868.

“R. P. DUNCAN,

“Supt. Indianapolis Manufactory.

“J. C. GEISENDORFF,

“Pres't Co.

“C. DICKSON & Co.’

To the paragraph of answer above set out the plaintiff replied, amongst other things, as follows:

“2d Par. Said plaintiff, for a further reply to the third paragraph of the defendants’ answer, says, that, after the execution of said written agreement, to wit:

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On or about the 1st day of December, 1871, the said firm of C. Dickson & Co., composed of the said defendants, ceased to exist, and so, the plaintiff says, said defendants abandoned the said contract. And the plaintiff avers, that, from the time of the making of said contract up to the time the said copartnership ceased to exist, she fully performed all the requirements of said contract."

The defendants demurred to this paragraph of reply, for want of sufficient facts, but the demurrer was overruled, and the defendants excepted.

We are of opinion that the court below erred in overruling the demurrer to the reply.

The contract, to be sure, was entered into by the defendants as partners. The contract thus executed by the defendants as partners became the joint contract of all the defendants. *Crosby v. Jeroloman*, 37 Ind. 264. They were jointly bound, so far as we can perceive, to the same extent as if they had each signed the contract in their individual names. The fact that the defendants were partners, it seems to us, was of no special importance, in any aspect of the case, except that they might sign the contract in the firm name by one of the members of the firm. We do not see that the continuance or discontinuance of the partnership between the defendants affected, in any way, their obligations under the contract to the plaintiff, or the plaintiff's obligation to them. The cessation of the partnership, therefore, was not an abandonment of the contract on the part of the defendants, nor did it authorize the plaintiff to treat the contract as rescinded.

The partnership did not cease to exist by reason of the death of any of its members, as will be seen by the reply, which shows that the firm was composed of the defendants in the action.

In *Tasker v. Shepherd*, 6 Hurl. & N. 575, a contract, in some respects similar to that here involved, covering a

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period of four years and a half, was held to be terminated before the expiration of the time stipulated for, by the death of one of the members of the firm, because it was construed to be for a period of four years and a half, subject to the condition that "all the parties so long lived."

In the case before us the partners are all living, and can perform the obligations resting upon them by virtue of the contract, as well without the continuance of the partnership as if it were continued; and the plaintiff has lost none of its rights, and is no way injured by the partnership between the defendants ceasing to exist.

Mr. Parsons says: "No dissolution, of any kind, affects the rights of third parties, who have had dealings with the partnership, without their consent. This is a universal rule, without any exception whatever." Parsons Partnership, 394.

One of the cases referred to by the above author is that of *Ault v. Goodrich*, 4 Russ. 430. The syllabus of the case above cited, in respect to the point under consideration, is as follows:

"A general dissolution of partnership between A. and B. does not operate to discharge A. from his responsibility for the subsequent conduct of B. in respect of the engagements of the partnership with third persons, made prior to the dissolution."

In 2 Collyer Partnership, 6th ed., by Wood, p. 894, the author says, in speaking of the above case from Russell:

"Upon this case it may be observed, first, that the facts are not satisfactorily stated; and, secondly, that the judgment leads to the inference that the responsibility of Wilcox, the elder, for the conduct of Wilcox, the younger, did not turn upon the circumstance that they were partners together, but upon the circumstance that they were jointly intrusted with the management of the tree speculation. In this view of the case it was obviously immaterial whether the Wilcoxes had dissolved partnership or not."

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So, in the case before us, the defendants were to be jointly entrusted with the sale of the plaintiff's goods, mentioned in the contract, for the period of five years; and it was obviously immaterial whether they dissolved or continued their partnership. The rights and obligations of the parties to the contract were in no manner changed or affected by the dissolution of the partnership, unless it be the rights and obligations of the defendants as between themselves. The defendants could make whatever arrangement they pleased as between themselves, so that they faithfully performed their contract with the plaintiff, and the plaintiff could not be affected thereby, or be heard to complain thereof.

This view of the question is conclusive to our minds; but it may be added that a partnership, dissolved for future operations, remains in force for the closing of the business of the concern.

Thus it is said by Mr. Collyer, *Collyer Partnership*, Perk. ed., p. 546: "From the nature of a partnership, engagements may be contracted which can not be fulfilled during its existence, exposed as it is to sudden and arbitrary terminations; and the consequence, therefore, must be, that, for the purpose of making good outstanding engagements, of taking and settling all the accounts, and converting all the property, means, and assets of the partnership, existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and proportions, the legal interest subsists, although, for all other purposes, the partnership is actually determined."

In *Waring v. Robinson*, Hoff. 524, 528, it is said, that "It is undeniable that the authority of each partner over unclosed matters continues after the dissolution."

In *Holmes v. Shands*, 27 Miss. 40, 44, it is said: "But the contract was made with the firm during the

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existence of the partnership, and it was competent for the parties, after dissolution, to carry out a contract previously made, and in part performed. To that extent, the partnership would be considered in law as still subsisting."

See, also, *Houser v. Irvine*, 3 Watts & S. 345.

Some other questions are made which arose in the subsequent progress of the cause, which we deem it unnecessary to consider.

For the error in overruling the demurrer to the paragraph of reply which we have thus considered, the judgment below will have to be reversed.

The judgment below at general term is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

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MECHANIC'S LIEN.—*Defence.*—*Pleading.*—*Payment.*—*Fraud.*—In an action by a mechanic, to enforce a lien for the value of labor performed by him for the contractor in the erection of a building for the defendant, the latter answered, alleging, that, at the time the notice of such intended lien was filed, the contractor was solvent, and the plaintiff could have collected his claim of him, and that afterward the plaintiff had assisted the contractor to dispose of his property subject to execution, with intent to defraud the defendant, well knowing, that, prior to the recording of such notice, the defendant had paid the contractor in full.

Held, on demurrer, that the plaintiff's right to a lien is statutory, and that the answer is insufficient.

From the Hancock Circuit Court.

D. S. Gooding, for appellant.

C. G. Offutt, for appellee.

Howe, C. J.—In this action the appellee, as plaintiff, sued the appellant, as defendant, to enforce an alleged

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mechanic's lien on certain real estate, particularly described, in Hancock county.

In his complaint, the appellee alleged, in substance, that, in the winter of 1875, the appellant contracted with and employed one William Morford to build for him, the appellant, a frame dwelling-house, one and one-half stories high, on certain real estate, described in said complaint, in said county, in consideration of which the appellant promised to pay said Morford the sum of ——— dollars; that the appellee contracted with said Morford to work on the appellant's said house, at two dollars and fifty cents per day; that, in pursuance of said contract, the appellee worked on the appellant's said house for forty days, amounting to the sum of one hundred dollars, beginning on December 8th, 1875, and ending on January 31st, 1876; that within sixty days after the completion of said work the appellee filed notice, that he intended to hold a mechanic's lien on said house and on said real estate on which said house was located, with the recorder of said Hancock county, on the 27th day of March, 1876, which lien was recorded in the record book for recording mechanic's liens, in the office of said recorder, setting out a copy of said notice of lien; and that said sum of one hundred dollars was due and wholly unpaid. Wherefore the appellee asked that said sum might be declared a lien on said real estate and dwelling-house, and for an order and decree of said court, that so much of said premises be sold as would satisfy the appellee's claim, and for other proper relief.

To this complaint the appellant demurred, for the want of sufficient facts therein to constitute a cause of action, which demurrer was overruled, and to this decision he excepted.

The appellant then answered in five paragraphs, to the fourth of which paragraphs the appellee demurred, for the alleged insufficiency of the facts therein to constitute a defence to his action, which demurrer was sustained by the court, and to this ruling the appellant excepted.

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The appellee replied, by a general denial, to the other affirmative paragraphs of the appellant's answer.

The issues joined were tried by the court without a jury, and a finding made for the appellee, that the matters alleged in his complaint were true, and the court rendered judgment accordingly. The appellant's motion for a new trial was overruled, and to this ruling he excepted and appealed to this court.

The appellant has properly assigned, as errors, the following decisions of the court below :

1. In overruling his demurrer to appellee's complaint ;
2. In sustaining the demurrer to the fourth paragraph of his answer ;
3. In overruling his motion for a new trial.

In his argument of this cause in this court, the appellant's counsel has failed to point out any objection to the appellee's complaint. The first alleged error, even if it existed, we therefore regard as waived.

It is insisted by appellant's counsel that the circuit court erred in sustaining the appellee's demurrer to the fourth paragraph of the appellant's answer. In this paragraph it was alleged, in substance, that, at the time of the filing of said notice of lien, in said recorder's office, the appellee's claim could have been collected by law from said Morford, but that the appellee conspired with said Morford, and, in pursuance of said conspiracy, aided him to dispose of his property, out of which said debt could have been made, for the purpose of cheating and defrauding the appellant, and causing him to pay said claim, well knowing that the appellant had, before the filing of said notice, fully paid said Morford for all the work done or to be done to said house.

It is very clear, we think, that the facts alleged in this fourth paragraph of answer were not sufficient to constitute a defence to appellee's action. By his compliance with the

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requirements of the statute, the appellee had acquired a valid lien upon the appellant's house and real estate, for the amount due the appellee for work done by him in the erection of said house. It is well settled by the decisions of this court, that the appellee's lien was not defeated by the alleged payment, by the appellant to Morford, of the full amount due or to become due to him on account of the erection of said house. *Colter v. Frese*, 45 Ind. 96, and *Crawford v. Crockett*, 55 Ind. 220. If the appellee's lien on the appellant's house and real estate had been only subsidiary to his personal claim against Morford—if, in other words, the appellee could not have sued, in the first instance, to enforce his lien, and not until he had exhausted his personal claim against Morford—then, perhaps, the matters alleged in the fourth paragraph, if properly pleaded, would have constituted a good defence to the appellee's action. But the lien acquired by the appellee, on the appellant's house and real estate, for the amount due him from Morford, was independent of his personal claim against the latter, and could be enforced in the first instance, even if the claim could have been collected by law from Morford. It follows, therefore, that, if the appellee aided Morford to dispose of his property, as alleged, such fact would not constitute any defence for the appellant, in this action. In our opinion, the circuit court did not err in sustaining the appellee's demurrer to the fourth paragraph of the answer.

No allusion is made by the appellant's attorney, in his brief of this cause, to the alleged error of the court below in overruling the motion for a new trial. Under the well settled practice of this court, we conclude that this alleged error is waived by the appellant. Besides, the evidence is not in the record; and, in the absence of the evidence, we must presume that the motion for a new trial, in this case, was correctly overruled.

The judgment is affirmed, at the appellant's costs.

Coan v. Grimes.

COAN v. GRIMES.

SHERIFF'S SALE. *Misdescription of Premises.—Complaint by Purchaser Against Judgment Defendant, to Recover Bid and Taxes.—Parties.*—In an action by the purchaser of land sold at a sheriff's sale, against the judgment defendant, who was the owner of the land, the complaint alleged, that, at the request and for the use of the defendant, the plaintiff, a stranger to the judgment, had bid, and paid to the sheriff, a certain sum of money, for the land, and also taxes thereon, but that, on account of a misdescription of the land, made by the sheriff in levying on the land and advertising it for sale, the sale was void.

Held. on demurrer, that the complaint is sufficient to authorize a recovery of the money so bid and paid.

Held. also, that the sheriff was not a necessary party defendant.

SUPREME COURT.—*Misjoinder of Actions.*—The Supreme Court, on appeal, will not reverse a judgment on the ground of a misjoinder of causes of action in the complaint.

NEW TRIAL.—*Exception.—When Taken.—Practice.*—An exception to the overruling of a motion for a new trial must be taken at the time such ruling is made, and the court can not allow time to take such exception.

SAME.—*Asking Leave to Withdraw Motion.*—It is not error to refuse leave to withdraw a motion for a new trial, which has been overruled without any exception having been taken, to allow the same to be re-filed.

From the Knox Circuit Court.

H. S. Cauthorn and J. M. Boyle, for appellant.

T. R. Cobb and O. Cobb, for appellee.

Howk, C. J.—In this action the appellee, as plaintiff, sued the appellant, as defendant, in a complaint of two paragraphs.

In the first paragraph the appellee alleged, in substance, that, on the 3d day of January, 1871, one John Baker obtained a judgment against the appellant for the sum of three hundred and thirty-five dollars and eighty cents, and costs, in the court of common pleas of Knox county, Indiana; that afterward said Baker caused an execution to issue on said judgment, directed to the sheriff of said county, commanding him to satisfy the same out of the appellant's property subject to execution; that, in pursu-

63	21
133	63
63	21
135	83
135	590
135	608
63	21
137	168
63	21
140	298
143	435
63	21
159	540

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ance of said execution, the said sheriff levied the same on a certain tract of land in said county, belonging to the appellant, particularly described in said paragraph, containing forty acres; that the said sheriff, by mistake, misdescribed said lands in said levy, setting out the erroneous description; that the said sheriff afterward advertised, that he would sell the said land on the 19th day of August, 1871, at the court-house door in said county; that, in the said advertisement, the said sheriff misdescribed the said land, in the same manner as in his said levy; that, on the said 19th day of August, 1871, he offered for sale the said land, by said erroneous description; that the appellee then and there, at the appellant's special instance and request, bid at said sale the sum of four hundred dollars, and the said land was then knocked off to him, the appellee, by said sheriff, by said erroneous description; that the appellee then and there paid to said sheriff, for the appellant's use, said sum of four hundred dollars; that afterward, on the — day of —, 1871, the appellee paid taxes on said land to the amount of seventy dollars; that the said sale was void, on account of the description in said levy and advertisement, and the appellee took no title by his said purchase; that the appellant failed and refused to deliver to the appellee the possession of said land, under said purchase, but still had possession thereof; that the appellant also failed and refused to pay to the appellee said four hundred dollars, the aforesaid purchase-money, or any part thereof, and said seventy dollars taxes, or any part thereof, although often requested so to do; and that both said sums were due and unpaid. Wherefore, etc.

In the second paragraph of his complaint, the appellee alleged, that, on the 10th day of March, 1870, he, the appellee, sold and delivered to the appellant one bay horse, for which the appellant agreed to pay the appellee the sum of one hundred and twenty-five dollars, and that the said sum was justly due and unpaid. Wherefore, etc.

The appellant demurred to the first paragraph of said complaint, upon the following grounds of objection :

1. Because it did not state facts sufficient to constitute a cause of action ;

2. Because two distinct causes of action were improperly joined therein ; and,

3. Because there was a defect of parties defendants therein, in this, that the sheriff, who made the levy and alleged sale, should have been a party defendant.

This demurrer was overruled, and to this decision the appellant excepted.

The appellant answered, by a general denial, the first paragraph of the complaint ; and, to the second paragraph thereof, he answered in five paragraphs, in substance, as follows :

1. A general denial ;

2. Payment in full, before the suit was commenced ;

3. The cause of action did not accrue within six years next before the commencement of this suit ;

4. That after the sale of the horse, alleged to have been sold by the appellee to the appellant, there arose between them a difference of opinion as to the nature of the transaction, the appellee alleging and insisting he had sold said horse to the appellant, and the appellant insisting that the horse was a gift to him by the appellee ; that then and there, by way of compromise, it was agreed between the parties, that the appellant should pay the appellee the sum of twenty-five dollars, and should deliver to him certain articles of the value of fifty dollars, and should work for him to the amount of ten dollars ; and the appellant averred, that he paid said money to the appellee, and delivered said articles to, and did said work for, the appellee, as agreed upon, before the commencement of this suit, and the appellee then and there received the same in full satisfaction of the demand sued for in the second paragraph of this complaint ;

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5. That the appellant admitted the sale and delivery of the horse to him by the appellee, as alleged in the second paragraph of the complaint; but the appellant averred, that the appellee warranted the said horse to be sound in every particular, and suitable to be used by appellant on his farm; that said horse was not sound in every particular, and was not suitable to be used by the appellant on his farm, but, on the contrary, was unsound, and was not suitable to be used by the appellant on his farm, or for any purpose whatever, and was of no value whatever to the appellant, and that, after the appellant ascertained the unsoundness and unsuitableness of said horse, he returned the said horse to the appellee, who received back and retained the said horse, as he was compelled to do under his said warranty of said horse.

The appellee replied, by a general denial, to the second, third, fourth and fifth paragraphs of said answer; and to said third paragraph he further replied, that the appellant, within the last six years next before the commencement of this suit, paid the appellee a part of the purchase-money of said horse, thereby admitting the indebtedness for said horse.

The issues joined were tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of five hundred and ninety-two dollars and fifty-five cents.

The appellant's motion for a new trial having been overruled, judgment was rendered on the verdict, on the 2d day of March, 1876, being the twenty-second judicial day of the February term, 1876, of the court below.

On the 4th day of March, 1876, being the twenty-fourth day of said term, the appellant moved the court for leave to withdraw his motion for a new trial, for the purpose of re-filing the same to be again passed upon by the court, and of reserving and saving an exception to the decision of the court, if the motion should be overruled, which

motion for leave was overruled by the court, and to this ruling the appellant excepted.

In this court, the first error complained of by the appellant is the decision of the circuit court, in overruling his demurrer to the first paragraph of appellee's complaint.

It is earnestly insisted by the appellant's counsel, that the facts stated in said first paragraph were not sufficient to constitute a cause of action, in favor of the appellee and against the appellant, because it is said that the appellee's bid at the sheriff's sale, and the payment of his bid to the sheriff, were voluntary acts on his part, and because there was no warranty in such sale. We recognize the well settled rule, that there is no warranty in judicial sales. This rule has been approved, and acted upon by this court, in several recent decisions. *Brunner v. Brennan*, 49 Ind. 98; *Weakley v. Conradt*, 56 Ind. 430; *Neal v. Gillaspy*, 56 Ind. 451; and *Weaver v. Guyer*, 59 Ind. 195.

But it can not be said, we think, under the averments of the first paragraph of his complaint, that the appellee was a mere volunteer or speculator, in his attempted and intended purchase of the appellant's real estate, at the sheriff's intended sale thereof. In the first paragraph of his complaint, the appellee alleged, that he made his bid of four hundred dollars, at the sheriff's sale, at the special instance and request of the appellant, and paid the money to the sheriff for the appellant's use. If these allegations are true, and, as they are well pleaded, the demurrer admits their truth, they are sufficient, independent of the other averments of the paragraph, to give the appellee a cause of action against the appellant for the recovery of the money paid at his request, and for his use, by the appellee, with interest thereon from the time of such payment. It seems to us, therefore, that no error was committed by the court in overruling the appellant's demurrer to the first paragraph of the complaint, for the alleged want of sufficient facts to constitute a cause of action.

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The second ground of demurrer, the alleged misjoinder of two causes of action, presents an immaterial question, in this court; for, in section 52 of the practice act, it is expressly provided, that "No judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." 2 R. S. 1876, p. 59.

The third ground of demurrer was not well assigned; for, under the view we have taken of the first paragraph of the complaint, it is very certain, we think, that the sheriff, who made the levy and alleged sale, was neither a necessary nor a proper party defendant. We hold, therefore, that the appellant's demurrer to the first paragraph of the appellee's complaint was properly overruled.

The appellant has assigned, as error, the decision of the court below, in overruling his motion for a new trial. The record shows, that, when this motion was overruled by the court, the appellant failed to except to the decision. The statute on this point is imperative: "The party objecting to the decision must except at the time the decision is made." 2 R. S. 1876, p. 176, sec. 343. The courts have no discretion on this point; they may give time to reduce the exception to writing, but not to make the exception. The error of the circuit court, if it exists, in overruling the motion for a new trial, is not properly saved in the record, and therefore the assignment of this error, in this court, presents no question for our decision.

The appellant earnestly complains of the action of the circuit court in refusing him leave to except to the overruling of his motion for a new trial, two days after the decision was made. It is claimed, that it was within the discretion of the court to grant leave to the appellant to except, after the decision was made, and that the denial of such leave was an abuse of discretion. We think, that the

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court had no such discretion. The statute is mandatory ; the party objecting must except at the time the decision is made. It would have been an error, if the court had allowed the appellant, over the appellee's objection, to except to the decision two days after it was made.

Nor do we think that the court erred, in overruling the appellant's motion for leave to withdraw his motion for a new trial for the purpose of re-filing the same to be again decided by the court, and of enabling the appellant to except to such decision at the time it was made. This would have enabled the appellant to accomplish, by indirection, what the court could not authorize him to do directly. The court very properly, we think, denied the appellant such leave, for such purpose.

The evidence on the trial is properly in the record, and fully sustains, in our opinion, every material averment of the complaint. It seems to us, therefore, that "the merits of the cause have been fairly tried and determined in the court below," and, in such a case, the statute forbids that we should reverse the judgment. 2 R. S. 1876, p. 246, sec. 580.

We find no error in the record, of which the appellant can complain.

The judgment is affirmed, at the appellant's costs.

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MORTGAGE.—Mistake.—Reformation of Description.—Pleading.—Husband and Wife.—A mistake in the description of lands intended to be mortgaged by a husband and wife may be corrected in an action therefor against them.

SAME.—Death of Party.—New Parties.—Heirs.—Where, prior to such ac-

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tion, the husband, being the owner of such lands, dies, his heirs should be joined with the widow as defendants.

From the Switzerland Circuit Court.

W. H. Adkinson and W. D. Ward, for appellant.

T. Livings, for appellee.

PERKINS, J.—Suit commenced by appellant against defendants, Mahala J. Wakefield and Thomas T. Wakefield, her husband, to correct and foreclose a mortgage.

The complaint was in one paragraph, to which a demurrer was sustained, and exception entered.

The death of Thomas T. Wakefield was suggested.

On leave given by the court, an additional paragraph of complaint was filed, which was demurred to, the demurrer sustained, and exception entered.

On leave given, said plaintiff filed a third paragraph of complaint, to which a demurrer was sustained, and, the plaintiff refusing to further amend, judgment was given for the defendant.

The third paragraph of complaint was as follows:

“Said plaintiff, Isaac F. McKay, for further cause of action against said defendants, Mahala J. Wakefield and Thomas T. Wakefield, says, that, on the 25th day of May, 1872, said Thomas T. Wakefield, by his promissory note, a copy of which is herewith filed and made a part hereof, promised to pay to plaintiff, or order, one hundred and forty-three dollars and fifty cents, with ten per cent. interest thereon from date, and that said note is now due and wholly unpaid; that, on said day, said defendants executed to plaintiff a mortgage on the real estate last hereinafter described, a copy of which is also herewith filed and made a part hereof, to secure the payment of said note, and that said mortgage was, on the 28th day of May, 1872, recorded in the record of mortgages in the recorder's office in said county.

“Plaintiff avers, that it was the intention of said defend-

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ants to mortgage the following described real estate, situate in Switzerland county, State of Indiana, to wit: Being a part of fractional section 10, town 3, range 12, and also a part of section 9, town 3, and range 12, bounded as follows: Beginning at a corner on the boundary line north, 10° east, $4\frac{7}{100}$ chains from the south-east corner of said section 10, town 3, range 12, and running thence north, 10° east, $33\frac{1}{100}$ chains; thence north, $88\frac{1}{2}^{\circ}$ west, $20\frac{95}{100}$ chains, to a branch; thence south, 27° east, $6\frac{75}{100}$ chains; thence(?), 51° east, $5\frac{25}{100}$ chains; thence south, $38\frac{1}{2}^{\circ}$ east, 2 chains; thence south, $53\frac{1}{2}^{\circ}$ east, $4\frac{16}{100}$ chains; thence (?), $1\frac{1}{2}^{\circ}$ east, $21\frac{50}{100}$ chains; thence east, $2\frac{58}{100}$ chains, to the place of beginning, containing $28\frac{82}{100}$ acres.

“But, by mistake, the following description was inserted in said mortgage, to wit: ‘A part of fractional section 10 and 15, township 3 north, of range 12 east, commencing on the boundary line at the corner between John Peters and Henry Peters, running south to a corner stone on said boundary line; thence west to a corner on section 9; thence north-west on the section line to a corner in section 9; thence north-west to a corner in the branch; thence down said branch, taking in 10 acres out of section 9, to a corner; thence east to the place of beginning, 30 acres more or less.’

“Plaintiff further avers, that, before the execution of said mortgage, said defendants had executed a mortgage on said real estate to plaintiff, to secure the payment of a sum of money due plaintiff, and that, before the execution of said mortgage, said defendant Thomas T. Wakefield pointed out to plaintiff, by metes and bounds, the real estate in this paragraph first described, and said defendants agreed to execute a mortgage on the same, but, by mistake, the the description last herein set out was inserted in said mortgage; that the mortgage last executed to plaintiff, and which is herein set out, was, by the agreement of said

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defendants, to be executed on, and made to cover, the same real estate which defendants had agreed to mortgage, herein referred to as aforesaid.

“Plaintiff further avers, that, at the time said first mortgage was executed, said defendant Thomas T. Wakefield pointed out to this plaintiff, by metes and bounds, the real estate in this paragraph first described, and that defendants agreed to execute the mortgage, in this paragraph set out, to plaintiff, to secure the debt sued on herein, on the real estate so pointed out; that, at the time said agreement was made, and said mortgage was executed, said Thomas T. Wakefield was the owner, in fee-simple, of said real estate so intended to be mortgaged as aforesaid, and was the owner of no other real estate; that said defendants, at the time said agreement was made and said mortgage executed, were residing on said land, and were in the full possession of the same, and have been continuously since said time in the possession of said land; and that defendants agreed to execute the mortgage herein set out, so as to include and cover the real estate on which they were residing and in possession of, as aforesaid; that plaintiff was not present at the time said mortgage was executed, and was ignorant of the fact that the same did not contain a description of the land agreed to be mortgaged, and so remained ignorant until this action was brought to foreclose said mortgage; and that he was informed by defendants that the said mortgage covered the said land agreed to be mortgaged, and which had been pointed out, as aforesaid.

“Plaintiff further avers, that said defendants have no other property, except the real estate first in this paragraph described, out of which his said debt can be made, and that, unless the relief prayed for in this paragraph of complaint is granted, his said debt will be entirely lost.

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“Wherefore plaintiff prays judgment that said mortgage be reformed and corrected, so as to include the real estate first in this paragraph described, and that plaintiff have judgment for two hundred dollars, and that said mortgage be foreclosed, and said real estate, or so much thereof as may be necessary, be sold to pay and satisfy said judgment, as other lands are sold on execution, and for all other proper relief,” etc.

If the mortgage, as executed, embraced a portion of the land intended to be mortgaged, it might, probably, be foreclosed upon that without reformation, the heirs of the deceased mortgagor being first made parties defendants. *Conklin v. Bowman*, 11 Ind. 254. But, we think, a *prima facie* case is made in the complaint for reformation of the mortgage. We think, there should be an answer. See *Halstead v. The Board, etc.*, 56 Ind. 363; *Mason v. Moulden*, 58 Ind. 1; *Busenbarke v. Ramey*, 53 Ind. 499; *Flanders v. O'Brien*, 46 Ind. 284.

The judgment is reversed, and the cause remanded for further proceedings, in accordance with this opinion.

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INTEREST ON OPEN ACCOUNT.—Interest on an open account may, in a proper case, be allowed.

PRACTICE.—*Withdrawal of Appearance Withdraws Pleading.*—*Default.*—*Process.*—*Record.*—*Supreme Court.*—Where a defendant who has been served with process withdraws his appearance, he thereby withdraws his answer also, and should be defaulted; and in such case, on appeal to the Supreme Court, the record must show the issue and service of process upon him, or the judgment against him will be reversed.

SAME.—*Appearance Without Process.*—*Discretion of Court.*—It is within the discretion of the court, on objection by the plaintiff, to refuse leave to a defendant, who has appeared without service of process, to withdraw his appearance.

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From the Tipton Circuit Court.

J. Green, D. Waugh, J. Waugh and J. W. Robinson, for appellant.

BIDDLE, J.—Complaint in the usual form of a common count, with a bill of particulars, by the appellee, against the appellant.

The record shows the following entry :

“Come now the parties by counsel, and the attorneys for defendant now withdraw his appearance, and, on motion, the defendant is three times called and comes not, but herein wholly makes default.”

The court then proceeded to try the case, and made the following finding :

“And the court, having seen and heard all the evidence adduced by the plaintiff, finds that there is due him on his complaint, from the defendant herein, the sum of one thousand seven hundred and twenty-five dollars and twenty-seven cents; and the court does further find, that, on the defendant’s answer to the plaintiff’s complaint, there is due said defendant, from the plaintiff, the following, to wit:” (here follow several items, amounting in all to one thousand and eighty-five dollars and forty-five cents); “and that the plaintiff herein have judgment against the defendant for the sum of six hundred and thirty-nine dollars and eighty-two cents, the principal and residue thereof; and the court further finds, that the plaintiff should recover of the defendant the further sum of two hundred and forty-nine dollars and forty-two cents, as interest on said principal, from the 16th day of August, 1869, up to the present time, the same being at the rate of six per cent. per annum.”

Judgment accordingly, for eight hundred and eighty-nine dollars and twenty-four cents.

The dates of the items in this bill of particulars run from June 5th, 1867, to August 15th, 1869: from which it

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appears that the court allowed interest on the account, commencing twelve months after the date of the last item.

There was no error in allowing interest.

The record does not show the service of a summons on the appellant, nor the officer's return thereon. We think this is a defect in the case. When the appellant withdrew his appearance, he necessarily withdrew his answer with it; for, if the answer remained in the record, the appearance was in also. That being the case, the record should show a default of the appellant, and should contain the summons, and the return of service thereon; otherwise the judgment is erroneous. *Coffin v. The Evansville and Crawfordsville R. R. Co.*, 7 Ind. 413; *Carver v. Williams*, 10 Ind. 267; *Smith v. Foster*, 59 Ind. 595.

Perhaps, when a defendant appears to an action without process and service, the court would not allow him to withdraw his appearance over the objection of the plaintiff, or, at least, in such a case, it would be within the judicial discretion of the court to allow, or not to allow, his withdrawal, according to the merits of the question. *The New Albany and Salem R. R. Co. v. Combs*, 13 Ind. 490.

As the record stands, there is no appearance in, and no proof of service of process; the judgment is therefore erroneous, and is reversed, at the costs of the appellee.

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REAL ESTATE, ACTION TO RECOVER.—*Information by State on Relation of Attorney General.—Lands Escheated to State for want of Heirs.*—Under section 9 of the act of March 10th, 1873, prescribing the duties of the attorney general, 1 R. S. 1876, p. 151, he may file an information in the nature of a *quo warranto*, in the name of the State, on his own relation,

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to recover the possession of real estate which has escheated to the State, for the use of the common school fund, for want of heirs or kindred entitled to inherit.

SAME.—*Adoption Under Laws of Foreign State.*—*Constitutional Law.*—*Common School Fund.*—The act of December 21st, 1865, 1 R. S. 1876, p. 417, enabling children adopted under the laws of any other state of the United States to take and hold real estate in this State, is not in conflict with section 2 of article 8 of the constitution of this State, 1 R. S. 1876, p. 38, prescribing what shall constitute the common school fund.

SAME.—Under said section 2 of article 8 of the constitution, it is "the fund to be derived from the sale of" escheated real estate, and not such real estate itself, which becomes a part of the common school fund.

SAME.—*Defence.*—*Adopted Child.*—Where an information has been filed in the name of the State, on the relation of the Attorney General, to recover the possession of real estate alleged to have escheated to the State for want of heirs or kindred entitled to the inheritance, it is sufficient to answer, alleging title through one adopted by the intestate, under the laws of another state of the United States, and the filing of the record of adoption, in this State, in accordance with said act of December 21st, 1865.

SAME.—*Evidence.*—*General Denial.*—All defences to such proceeding are admissible in evidence under the general denial.

From the Knox Circuit Court.

W. H. De Wolf, G. G. Reily, W. C. Johnson and S. N. Chambers, for the State.

F. W. Viehe and R. G. Evans, for appellee.

Howk, C. J.—This was an information, in the nature of a *quo warranto*, filed by the attorney general of this State, as the relator of the appellant, in the circuit court of Knox county, against the appellee, as defendant, for the recovery of certain real estate, particularly described, in said county, which real estate, it was alleged, had escheated to the State of Indiana, for the use and benefit of its common school fund.

In said information it was alleged, in substance, that, on the 14th day of May, 1861, one Margaretta Ormand became the owner, in fee-simple, of said real estate, by purchase, of the value of, to wit, ten thousand dollars; that afterward, on the 4th day of December, 1863, the said Mar-

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garetta Ormand departed this life intestate, and leaving no heirs capable of inheriting said real estate; that afterward, on the — day of —, 187—, the appellee entered into the possession of said real estate, and had ever since held possession thereof without right; and that, by means of the premises, the said real estate had escheated to the State of Indiana, for the benefit of its common school fund. Wherefore, etc.

To this information, the appellee answered in three paragraphs, the first being a general denial, and each of the other two paragraphs setting up an affirmative defence.

The appellant demurred to each of the second and third paragraphs of the appellee's answer, upon the ground that it did not state facts sufficient to constitute a defence to said information, which demurrers were overruled by the court, and to these decisions the appellant excepted.

The appellant declined to reply to the second and third paragraphs of said answer; and thereupon the court rendered judgment on said demurrer in favor of the appellee, from which judgment this appeal is now here prosecuted.

In this court the appellant has assigned, as error, the decision of the circuit court, in overruling the demurrers to the second and third paragraphs of the appellee's answer.

In the second paragraph of his answer, the appellee alleged, in substance, that, by an act of the Legislature of the State of Pennsylvania, approved May 4th, 1855, and still in force, it was provided, that it should be lawful for any person desirous of adopting any child as his or her heir, or as one of his or her heirs, to present his or her petition to such court in the county where he or she might be resident, declaring such desire, and that he or she would perform all the duties of a parent to such child; and such court, if satisfied that the welfare of such child would be promoted by such adoption, might, with the consent of the

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parents or surviving parent of such child, or, if none, of the next friend of such child, or of the guardian, or overseer of the poor, or of such charitable institution as should have supported such child for at least one year, decree that such child should assume the name of the adopting parent, and have all the rights of a child and heir of such adopting parent, and be subject to all the duties of such child, of which the record of the court should be sufficient evidence.

And the appellee said, that, on the 23d day of April, 1857, Margaretta F. Ormand, then a resident of the city and county of Philadelphia, in the State of Pennsylvania, filed her petition in the common pleas court for said city and county, setting forth that she was desirous of adopting as her daughter one Emma Louisa Simpson, then the minor child of Sarah Simpson, and whose father was dead, and declaring that the petitioner would perform all the duties of a parent to said child; that said court was then satisfied that the interests of said child would be promoted by such adoption; and, therefore, with the consent of said Sarah Simpson, the only surviving parent of said child, decreed that said child should assume the name of the adopting parent, and have all the rights of a child and heir of said adopting parent, and be subject to all the duties of such child; that afterward, on the — day of —, 1863, the said Margaretta F. Ormand departed this life intestate, without leaving issue surviving her; and thereupon the said adopted child entered into the possession of said real estate, claiming the same by virtue of her adoption as heir at law of said decedent, and so remained in possession until the — day of November, 1871, when she and her then husband, Richard Peniston, conveyed the same by deed, with full covenants of warranty, to the appellee, who had been ever since and then was in possession thereof; and that, on the — day of —, 1866, there was filed with the clerk of the court of common pleas of Knox county,

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Indiana, a copy of said proceedings of said common pleas court of said city and county of Philadelphia, and on the same day the said copy was, by the order of said court of common pleas of Knox county, in open session of said court, entered on the order-book thereof.

The third paragraph of the appellee's answer is substantially the same in its averments as the second paragraph thereof, and differs therefrom only in this, that it was alleged in said third paragraph, that the said copy of said proceedings of said common pleas court, of the said city and county of Philadelphia, was filed in the court below, with the clerk thereof, on the 13th day of September, 1875, for the purpose of perfecting the title so conveyed to the appellee by law, and that afterward, on said last named day, the said copy, duly authenticated, was, by the order of said last named court, in open session of said court, entered on the order-book thereof.

The question for decision in this case is this: Are the facts stated in the second and third paragraphs of the appellee's answer, sufficient to constitute a valid defence to the appellant's information?

In section 761, of the practice act, it is provided, that, "Whenever any property shall escheat, or be forfeited to the State for its use, the legal title shall be deemed to be in the State from the time of the escheat or forfeiture; and an information may be filed by the prosecuting attorney in the circuit court for the recovery of the property, alleging the ground on which the recovery is claimed; and like proceedings and judgment shall be had, as in a civil action for the recovery of property." 2 R. S. 1876, p. 301.

Under the facts alleged in the information in this case, the attorney general had the right to sue in the name of the State, on his own relation. 1 R. S. 1876, p. 152, sec. 9. Under section 596 of the practice act, the second and third paragraphs of the appellee's answer were unnecessary

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pleadings in this action, as the appellee, under the general denial, in the first paragraph of his answer, was "permitted to give in evidence every defence to the action that he may have, either legal or equitable." 2 R. S. 1876, p. 252. But, as the appellant's relator does not complain, in this court, of the second and third paragraphs of the answer, upon the ground that they were unnecessarily pleaded, we will consider and decide the questions presented in and by said paragraphs, as if the same had been necessarily pleaded in this action.

It is conceded by the learned counsel of both the appellant and the appellee, that the decision of this cause depends entirely upon an act of the General Assembly of this State, entitled "An act to enable any child heretofore adopted, or which may hereafter be adopted, by any person, under the laws of any state of the United States, to take and hold real estate in this State as if the child had been adopted under the laws and within the State of Indiana," approved December 21st, 1865. 1 R. S. 1876, p. 417, note 1. It is conceded by the appellant's counsel, as we understand them, that, if the above entitled act is constitutional and valid, then the facts stated in said paragraphs of answer would constitute good and sufficient defences to the appellant's action. On the other hand, it is conceded by the appellee's counsel, that, if said act is unconstitutional and void, the second and third paragraphs of the appellee's answer do not state facts sufficient to constitute valid defences to the appellant's information.

The act in question contained but two sections, the second of which simply declared that an emergency existed for the immediate taking effect of said act, and that the same should, therefore, take effect and be in force from and after its passage. Omitting the enacting clause, the 1st section of said act provided as follows:

"That wherever any child may have heretofore been

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adopted or may hereafter be adopted by any person in any other state of the United States, under and pursuant to the laws in force in the state where such adoption shall be made, the same shall, upon filing the record thereof with the clerk of the court of common pleas of any county within this State, and having the same entered upon the order-book of said court in open session thereof, have the same force and effect, and such child so adopted shall have the same rights and be capable of taking property situate within this State, by inheritance, upon the death of the person adopting, whether before or after the passage of this act, as though such child had been adopted within and pursuant to the laws of the State of Indiana.”
Supra.

It is claimed by the appellant’s counsel, that this section of the statute is in conflict with the provisions of the 8th article of the constitution of this State, and is therefore void. In section 2 of this 8th article, it is provided, that “The common school fund shall consist of,” among other things, “all lands and other estate which shall escheat to the State for want of heirs or kindred entitled to the inheritance.” In section 3 of the same article, it is provided, that “The principal of the common school fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of common schools, and to no other purpose whatever.” 1 R. S. 1876, pp. 38 and 39.

The argument of the appellant’s counsel may be summarized, as follows :

On the 4th day of December, 1863, Margaretta Ormand died intestate, and seized in fee-simple of the real estate described in the information, and without “heirs or kindred entitled to the inheritance;” thereupon the said real estate escheated to the State, and became a constituent part

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of the "common school fund;" this "fund shall remain a perpetual fund, which may be increased, but shall never be diminished;" that, in so far as the said act of December 21st, 1865, before cited, was retroactive in its provisions, its effect was necessarily, in this case, to diminish the "common school fund," to the extent of the value of said real estate; and that that far forth the act in question was in direct conflict with the provisions of said section 3 of article 8 of the constitution, and was therefore void and of no effect.

It seems to us, that this argument is unsound. It is very clear, we think, that the real estate described, as such, never became a component part of the "common school fund," as described in said article 8 of the constitution. We read the 3d section of said article, in so far as it is applicable to the case at bar, as follows:

"The common school fund shall consist of * * * the fund to be derived from the sale of * * * all lands and other estate which shall escheat to the State for want of heirs or kindred entitled to the inheritance.

The provisions of said article 8 of the constitution, in relation to education, were certainly not self-acting in their operation. Legislation was requisite and necessary to carry those provisions into practical effect, and especially to create the "common school fund," therein and thereby provided for, and to make it "safe and profitable." Accordingly it was provided in section 4 of said article, that "The General Assembly shall invest," (that is, provide by law for such investment,) "in some safe and profitable manner, all such portions of the common school fund as have not heretofore been intrusted to the several counties; and shall make provision by law for the distribution, among the several counties, of the interest thereof." 1 R. S. 1876, p. 39. "The fund to be derived from the sale of" escheated real estate, and not the real estate itself, would become, under

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the constitution, a part of the "common school fund;" and, as the real estate, described in the appellant's information, has never been sold as escheated lands, of course the fund to be derived from such sale has never become a part of the "common school fund.'

We have said, that legislation was requisite and necessary to carry into effect the provisions of the 8th article of the constitution of this State; and especially was it necessary, we think, that the General Assembly should provide, by just, wise and liberal legislation, for the management, care and final disposition of escheated estates. It had never been, and is not now, in our opinion, the policy of this State, to enforce rigidly the recovery of escheated or forfeited estates. That this is so, is shown by the many acts, passed by the Legislature of this State, to enable the alien heirs of deceased owners of real estate, which had escheated to the State for the want of legal heirs or kindred, to take the inheritance.

At the first session of the General Assembly, after the adoption of the present constitution of this State, an act was passed, entitled "An act providing for the settlement of decedents' estates, prescribing the rights, liabilities and duties of officers connected with the management thereof, and the heirs thereto, and certain forms to be used in such settlement," approved June 17th, 1852. Sections 141 and 142 of this act contain full, and we think, wise and liberal provisions in relation to the care, management and the final disposition of escheated real estate. 2 R. S. 1876, p. 544. In section 11 of "An act regulating descents and the apportionment of estates," approved May 14th, 1852, it is provided, that "The estate of a person dying intestate without kindred capable of inheriting, shall escheat to the State, and shall be applied to the support of common schools, in the manner provided by law." 1 R. S. 1876, p. 410. But the said sections 141 and 142, before cited, provide

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when, how and in what manner the real estate of such intestate shall be sold, and what shall be done with the proceeds of such sales. These sections read as follows :

“Sec. 141. If, at the final settlement of an estate, there be real estate undisposed of, and no heirs who are entitled to its possession, claiming it, if there be an executor thereof, the court shall direct him to lease such real estate, if it be susceptible of producing rent, to any person, for a period not over one year, taking bond of the lessor [lessee?], with sufficient surety for the amount of such rent, conditioned to keep in good order such premises, and [for?] the payment of taxes thereon ; and if there be no executor, the court shall direct the administrator of such estate to lease such real estate, under the same regulations as are provided in the case of an executor ; but before proceeding to such duties, such executor or administrator shall execute a bond payable to the State of Indiana, with a penalty in double the value of such real estate, with surety to be approved by the court, conditioned for the faithful performance of the duties of his trust.

“Sec. 142. Such court may, from time to time, order the releasing of such real estate, in case the heirs thereof do not appear and establish their heirship, until the expiration of five years after such final settlement, when if no heirs appear, the court shall order such executor or administrator to sell such real estate under the same regulations as are provided in case of sales of real estate, where the personal is insufficient to pay debts, and upon the purchase-money therefor being paid into court, the clerk shall pay the same to the treasurer of the county, who shall pay it to the treasurer of state, on whose books it shall be credited to the unknown heirs of the deceased.”

These sections of the decedents' estates' act were enacted immediately after the adoption of the present constitution

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of this State, by a General Assembly, many of whose members had also been members of the convention which framed that constitution. The legislation is important, therefore, as a contemporaneous exposition or construction of the provision of the constitution in relation to escheated lands. It is evident, we think, from the provisions of these sections, which have continued since their enactment, and still are, a part of the law of this State, that the Legislature never understood nor intended that the real estate of a decedent, "for the want of heirs or kindred entitled to the inheritance," became, as real estate, a component part of the "common school fund," which should "never be diminished." The theory of the law is, that such real estate of such decedent, which might not be needed for the payment of debts, should be kept intact as real estate, until the expiration of five years after the final settlement of the decedent's estate, and should then be sold, under the order of the proper court, as real estate is sold for the payment of a decedent's debts, and the proceeds of such sale should be paid ultimately into the state treasury.

We are clearly of the opinion, that the real estate in controversy in this action has never yet become a constituent part of the "common school fund." In so far as this case is concerned—and we confine our decision to the case at bar—it seems to us, that the provisions of the act of December 21st, 1865, before cited, are in no manner affected or invalidated by any of the provisions of the 8th article of the state constitution; and that, under the averments of the second and third paragraphs of the appellee's answer, and the law applicable thereto, the adopted child and heir of the deceased owner of said real estate lawfully took the inheritance.

The facts alleged in the affirmative paragraphs of the appellee's answer were sufficient, we think, to constitute a complete defence to the appellant's information.

The judgment is affirmed.

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63	44
148	455
63	44
153	676

MORTGAGE.—*Foreclosure.*—*Action Against Subsequent Purchaser.*—*Notice.*—*Recording Mortgage.*—In an action to foreclose a mortgage on real estate, and to recover a personal judgment for the amount of the mortgage debt, against a subsequent purchaser of the mortgaged premises, who is alleged in the complaint to have assumed the payment of the mortgage debt as part of the purchase-money, it is not necessary to aver that such mortgage was ever recorded.

SAME.—*Identifying Mortgage Assumed.*—Where the averments of the complaint clearly identify the mortgage assumed by the defendant as the mortgage in suit, the fact that the defendant assumed the same as being payable to only one of several persons for whose use it was in fact payable, as appears from the complaint, does not render it insufficient.

SAME.—*Defect of Parties.*—In an action to foreclose a mortgage on real estate, against the last of several subsequent purchasers, each of whom, in receiving a conveyance of the land in fee-simple, had assumed the payment of the mortgage debt as part of the purchase-money, such other purchasers are not necessary parties defendants.

SAME.—*Evidence.*—*Record of Conveyance.*—The record of the deed to such defendant for the mortgaged premises is competent evidence of the delivery to him of such deed.

SAME.—*Indemnity Mortgage.*—Where the mortgage in suit was executed to indemnify the mortgagee against loss by reason of another mortgage, which was a lien upon another tract of land conveyed to the plaintiff by the mortgagor, an objection to admitting the latter mortgage in evidence, on the ground that the record thereof had not been satisfied, admits that it had been recorded, and that the defendant had notice of it.

SAME.—*Deed to Plaintiff.*—The said deed from such mortgagor to the plaintiff for the latter mentioned tract of land is competent evidence against the defendant.

SAME.—*Witness.*—*Husband and Wife.*—Where such mortgage was executed for the use of a husband and wife, he is a competent witness in his own behalf, in a joint action by them to foreclose the same, though such deed of conveyance was made to her alone.

SAME.—*Harmless Evidence.*—The introduction in evidence of the deed from the mortgagor, for the mortgaged premises, to the defendant's grantor, and of the record of the foreclosure of the mortgage for which the one in suit was given as an indemnity, though probably unnecessary, was not harmful.

SUPREME COURT.—*Improper Amendment by nunc pro tunc Entry.*—*Certiorari.*—Where, upon the whole record, except that objected to, a judgment appealed from appears to be right, the Supreme Court will affirm the

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judgment, though an improper amendment of the record be made by the court below, by a *nunc pro tunc* entry, over the objection of the party appealing.

From the Boone Circuit Court.

G. H. Goodwin, T. J. Terhune, R. W. Harrison, N. B. Taylor, F. Rand and E. Taylor, for appellants.

L. Barbour and J. H. Laird, for appellees.

BIDDLE, J.—Jacob Eldridge and Esther Eldridge, his wife, in their complaint against John Scarry and Rebecca Scarry, his wife, aver, that, on the 12th day of February, 1874, the plaintiffs purchased of Edward Earl and Navini Earl lot number one, in block ten, in the town of Jamestown, in said county, for which they paid two thousand dollars, and took the conveyance in the name of Esther M. Eldridge; that there was an incumbrance on said lot, secured by a mortgage, dated August 20th, 1873, executed by R. L. Whittington and Mattie E. Whittington, his wife, then the owners and in possession thereof, to William H. Dickerson, duly acknowledged, delivered and recorded, to secure the payment of a promissory note for five hundred dollars, with interest, etc.; that, to indemnify the plaintiffs against said mortgage, the said Edward Earl and Navini, his wife, executed, acknowledged and delivered to the said Esther M. Eldridge, “for the use of the plaintiffs,” a mortgage on thirty feet off of the east side of lot No. two, in block No. seven, in said town of Jamestown, which was duly recorded, and on the same day conveyed said lot No. one to the mortgagees—the present plaintiffs; that, after said indemnifying mortgage was so executed by Earl and wife to the plaintiffs, the said Earl and wife, on the 20th day of March, 1874, conveyed the premises so mortgaged to Adam R. Miller, by deed of warranty, subject to the indemnifying mortgage executed to secure the payment of the note for five hundred dollars, which was a mortgage incumbrance on said lot one, in block ten, and

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which Miller agreed to pay, as part of the purchase-money, to Earl and wife, not to exceed five hundred and thirty-five dollars; that, on the 21st day of March, 1874, Adam R. Miller, and Lizzie Miller, his wife, sold and conveyed, by deed of warranty, the thirty feet off of the east side of lot number two, to John Scarry, for the consideration of two thousand dollars; that John Scarry, as part of said purchase-money, agreed to assume and pay the said note and mortgage of five hundred dollars, and to hold the said Jacob Eldridge and Adam R. Miller harmless therefrom, which said assumption of Scarry was inserted in the deed to him executed by Miller and wife, for the said thirty feet off of said lot No. two; that neither said Edward Earl, nor the said Adam R. Miller, nor the said John Scarry, ever paid off said incumbrance on lot one, in block ten, nor any part thereof, but wholly refused so to do; that the mortgagee foreclosed said mortgage on said lot number one, and the plaintiffs were compelled to pay, and did pay off and discharge, the same.

Prayer for judgment against John Scarry for one thousand dollars, that the said mortgage on said lot number two be foreclosed, the premises sold to pay the same, and that the balance, if any remain, be levied of the goods and chattels of said John Scarry. Wherefore, etc.

A demurrer to the complaint, alleging the insufficiency of the facts therein stated to constitute a cause of action, was overruled, and exceptions taken.

A demurrer to the complaint was then filed, alleging a defect of parties—that Edward Earl and Adam R. Miller are necessary defendants. This demurrer was also overruled, and exceptions reserved.

Answer, general denial; trial by the court; finding for the appellees, against Scarry, that the mortgage be foreclosed and premises sold to pay the judgment, etc.

Judgment upon the finding.

The record properly presents the questions of overruling the demurrer to the complaint, and of overruling a motion for a new trial, which are assigned as errors in this court.

The objection taken to the complaint on the demurrei for want of sufficient facts is, that it does not aver when or where the mortgage sought to be foreclosed was recorded. In support of this objection, the appellants cite the case of *Faulkner v. Overturf*, 49 Ind. 265; but we do not think this case bears them out. It is true, that, where a mortgage is to be enforced against a subsequent grantee of the land, in good faith, for a valuable consideration, without notice, then the complaint should show that the mortgage was recorded in the proper county and within the proper time; but, in a suit by the mortgagee against the mortgagor, or against a subsequent grantee with notice, no averment that the mortgage was recorded is necessary.

In the present case, Scarry stipulated, in the deed he received from Miller, to pay the mortgage sought to be foreclosed. In such a case, it is immaterial whether the mortgage was ever recorded or not. But the appellants say that this stipulation was to pay off a mortgage to Jacob Eldridge, while the exhibit shows that the mortgage was executed to Esther M. Eldridge. It is averred in the complaint, however, that the purchase of the lot to be protected by the mortgage was made by Jacob Eldridge and Esther, his wife, and the conveyance made to Esther, for the use of the appellees; and subsequent averments in the complaint sufficiently show that the mortgage, which Scarry agreed to pay to protect Miller, was the same one which Miller agreed to pay to protect Earl. We think, therefore, that the mortgage which is sought to be foreclosed is clearly identified as the mortgage which Scarry agreed to pay, and, having stipulated to pay it, he certainly had notice of it; hence it is not necessary to aver that it had been recorded.

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The appellants further insist, that Earl and Miller should have been made defendants to the complaint. We do not think it was necessary. The ground of action in favor of the appellees is founded on the deed to Esther M. Eldridge, and on the indemnity mortgage executed by Earl, for the benefit of the appellees, and Scarry's stipulation to pay it. The deeds of Earl and Miller show that they have parted with all interest in the land mortgaged; they, therefore, need not be made parties to the foreclosure of the mortgage.

It may be that the appellees had a remedy against Earl and against Miller; but it is very certain, we think, that they have shown a cause of action against Scarry, independent of Earl or Miller. It appears to us, that the complaint is sufficient. Nothing is sought to be recovered in this action against either Earl or Miller, nor can their interests be unfavorably affected by the judgment.

At the trial, the appellees offered the deed of Miller and wife to Scarry in evidence; the appellants objected, on the ground that the delivery of the deed to Scarry had not been proved, and that the record of the deed was not competent evidence to prove the delivery. The objection was overruled, and properly, as to these grounds, and no other ground was pointed out. There was no objection made on the ground of variance.

The appellants also objected to the introduction of the mortgage executed by Whittington and wife—the incumbrance complained of—when it was offered in evidence to the court, upon the ground that the mortgage record did not show a satisfaction of the mortgage, and that the same was incomplete, irrelevant, and immaterial.

This objection was properly overruled. No objection was made upon the ground that it had not been recorded, nor that Scarry had no notice of it; but the objection implies that it was recorded, and that Scarry had notice of it.

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The introduction of the deed from Earl and wife to Esther M. Eldridge, as evidence, was also objected to by the appellants, upon the ground that it did not tend to prove or disprove any fact in issue.

The objection was properly overruled. This deed was directly necessary to sustain the action; for, if the appellees had no title to the lot they had purchased from Earl, they would have no right to seek a foreclosure of a mortgage given to protect its title.

Jacob Eldridge, the husband of Esther, was offered as a witness at the trial. His testimony was objected to on the ground that he was the husband of his co-plaintiff, and that the mortgage sued on was executed to, and was the separate property of, his wife Esther.

The objection was overruled, and exception taken. The averment in the complaint is, that the lot to be protected by the mortgage to Esther was purchased by the witness and his wife, and that the mortgage was executed for their joint use; and, in his testimony, he stated that he owned a half interest in the property. As to this half, he was a competent witness. The objection was, therefore, properly overruled. *Haskit v. Elliott*, 58 Ind. 493.

The deed from Earl to Miller, and the record of the foreclosure of the mortgage of Whittington and wife to Dickerson, were introduced as evidence, over the objections and exceptions of the appellants, but we can perceive no objections to their introduction; nor are we sure their introduction, or either of them, was at all necessary to the case. The deed from Earl to Miller was no part of the ground of action against Scarry; and the appellants might have paid off the mortgage to Dickerson, without there having been any foreclosure of it, and still have held Scarry bound as the vendee of Miller, and upon his stipulation in the deed from Miller.

The transcript in this case was amended by a *nunc pro*

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tunc entry in the court below, introducing matter into the bill of exceptions which it did not contain when it was originally certified to this court. A portion of this part of the record was objected to by the appellants, and, perhaps, properly; but we do not notice their objection, because, we think, upon the record as it stood without the attempted amendment, except such part of it as was not objected to, that the judgment is right. *Josselyn v. Edwards*, 57 Ind. 212; *Hoffman v. Risk*, 58 Ind. 113.

The judgment is affirmed, at the costs of the appellants, with four per cent. damages.

ON PETITION FOR A REHEARING

BIDDLE, J.—The counsel for appellants think that we are mistaken in supposing that a part of the amendment to the record made in return to a certiorari was not objected to below.

We have again looked carefully to the amendments, and do not think we are mistaken. The portion of the amendments to which the counsel objected closes with these words: "And to this part of said order the defendants excepted at the time. All of which amendments and corrections, so ordered by the said court on said motion of plaintiffs, are made and set out fully above." The record then proceeds: "And further, in obedience to the writ of certiorari from the Supreme Court," etc. Then follows an amendment to the record inserting the motion for a new trial and the causes assigned therefor, to which there is no trace of any exception taken at the time; and the entry just above this amendment, showing that the parts excepted to were "set out fully above," precludes what followed from being a part of what preceded. So reads the record, and so we must hold it to be.

Counsel for appellants further think that there is a material difference in the description of the lot, between "Lot

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No. 1, in Block No. ten (10), in the town of Jamestown," and "Lot No. one (1), and Block No. ten (10), in the town of Jamestown,"—"and there is no allegation of mistake, and no prayer for reform."

There might be a difference between these two descriptions set out in a pleading *in hæc verba*; but the averments in the complaint show that the mortgage sought to be foreclosed against Scarry is the same mortgage that Scarry in his deed from Miller stipulated to pay, as a part of the consideration for his purchase, and to hold Eldridge and Miller harmless therefrom. We do not see how it would be possible to foreclose the wrong mortgage under the averments and evidence in the case; at least we are fully convinced that the right mortgage was foreclosed on the right property, and that it is the same mortgage which Scarry stipulated to pay in the deed he received from Miller, and to save the appellees as well as Miller harmless therefrom.

Other questions made in the petition for a rehearing are fully considered in the original opinion, and we find no reason to change our views.

The petition is overruled.

Original opinion filed at May term, 1878.

Opinion on petition for a rehearing filed at November term, 1878.

STEWART ET AL. v. MADDUX.

63	51
157	82

FALSE IMPRISONMENT.—Action on the Case.—Trespass.—Evidence.—In an action for damages for false imprisonment, wherein the complaint alleged, that the defendants, while unlawfully holding the plaintiff in custody, had compelled him, by menaces, force and as the price of his liberty, to execute and deliver to one of the defendants a promissory note for a certain sum, the defendants offered to prove that the payee had directed a co-

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defendant to visit the plaintiff, to procure him to execute such promissory note, pursuant to a contract which, the payee stated to such co-defendant, existed between the payee and plaintiff.

Held, that the evidence was properly excluded.

SAME.—Measure of Damages.—Exemplary Damages.—Where, in such action, the facts alleged or proved against the defendants amount to a criminal offence, exemplary damages can not be assessed.

SAME.—Compensatory Damages.—In assessing the damages to be recovered by the plaintiff in such an action, the jury trying the case are not restricted to the mere naked amount of pecuniary loss suffered by the plaintiff; but they may also take into consideration any indirect pecuniary injury which is a necessary consequence of the defendant's direct act, if warranted by the averments of the complaint, such as loss of time, delay in business and expenses incurred; also the plaintiff's physical suffering, such as bodily pain, permanent disability and disfigurement; also the plaintiff's mental suffering, such as anguish of mind, sense of shame or humiliation and loss of honor; and also injury to the plaintiff's business, profession, reputation, or social position;—all of which are compensatory, and not exemplary.

From the Shelby Circuit Court.

B. F. Love and *W. Z. Conner*, for appellants.

T. B. Adams and *L. T. Michener*, for appellee.

BIDDLE, J.—Complaint by John A. Maddox against James Y. Stewart, Samuel Stewart, and John A. Wright, averring the following facts:

That, "on the 16th day of December, 1874, at the city of Shelbyville, county of Shelby, and State of Indiana, the said defendants did then and there unlawfully, forcibly and maliciously, with force of arms, make an assault upon the person of the plaintiff, and then and there, by menaces of violence to his person, and threats that they, the said defendants, would take plaintiff's life, did then and there unlawfully, forcibly, and maliciously, by the means aforesaid, restrain the plaintiff of his liberty, and imprison and hold him in custody against his will, for a great length of time, to wit, for the space of three hours, without any legal authority so to do, and did then and there, by the use of said violence, and the restraint of plaintiff's liberty, as aforesaid, compel the plaintiff to deliver to one of the

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defendants, to wit, James Y. Stewart, a promissory note, payable by plaintiff to said defendant Stewart, for a great sum, to wit, the sum of two hundred and fifty dollars; that, by reason of said assault, menaces and threats, and unlawful and forcible imprisonment, the plaintiff was not only deprived of his liberty, but was compelled to and did undergo great mental suffering, anguish and humiliation, and was detained and prevented from attending to his business for a great length of time, to wit, one day; by means of all which he was damaged in the sum of fifteen thousand dollars, for which sum he demands judgment and all other proper relief."

A second paragraph of complaint, omitting the formal introductory part, is as follows:

"That heretofore, to wit, on the 16th day of December, 1874, at the county of Shelby and State of Indiana, the said defendants did unlawfully conspire together, to forcibly, maliciously, and unlawfully imprison this plaintiff, and that said defendants then and there, in pursuance of said conspiracy, did unlawfully, maliciously and forcibly, with menaces and threats of bodily harm, and by an assault on plaintiff with dangerous and deadly weapons, imprison, detain and restrain him of his liberty, against his will, and without right or legal authority so to do, for a great length of time, to wit, for three hours; that said defendants then and there compelled this plaintiff, in order to secure his release, and discharge him from said forcible and unlawful imprisonment, to then and there execute and deliver to one of said defendants, to wit, James Y. Stewart, a certain promissory note, payable by said plaintiff to said Stewart, for a great sum of money, to wit, the sum of two hundred and fifty dollars; that, by reason of said forcible and unlawful imprisonment, and of the said menaces, threats, violence and assaults with dangerous and deadly weapons on the plaintiff, as aforesaid, he was not only deprived of

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his liberty, but was compelled to and did undergo great mental suffering, anguish and humiliation, and was detained and prevented from attending to his business for a great length of time, to wit, for one day; by reason of all of which he was damaged in the sum of fifteen thousand dollars, for which sum he demands judgment and all other proper relief."

Various demurrers were filed to the complaint, rulings had upon them, and exceptions reserved; but, as they are not discussed in the appellants' brief, we do not state them.

Answer, general denial; trial by jury verdict and judgment for appellee.

By a motion for a new trial, several questions are presented in the record; such as have been discussed by the parties in their briefs will be decided.

At the trial, the appellants offered to prove by the defendant John A. Wright certain directions given to him by his co-defendant James Y. Stewart, in reference to hunting the plaintiff Maddox, in Rush county, and procuring the execution of the two-hundred-and-fifty-dollar note; that, after the note was filled up, he took it, under the directions of Stewart, and made search for Maddox, as Stewart's agent, with a view of procuring Maddox to execute the note; and the directions of Stewart to Wright, and what Stewart said concerning an agreement existing between Stewart and Maddox, in reference to the execution of the two-hundred-and-fifty-dollar note by Maddox to Stewart, before the meeting of the plaintiff and defendants at the telegraph office in Shelbyville, on the 16th day of December, 1874, the time and place at which the wrong complained of is alleged to have been committed; all of which, upon objection made by the appellee, the court refused to admit.

There is no error in these rulings. We can not see how

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the directions of one defendant to a co-defendant in an action of tort charged against both, or how any agreement, understanding or relation between co-defendants in such a case, could be given in evidence in their favor, or in favor of either of them; or how any such directions, agreement or relation could possibly bind the plaintiff in the action.

The appellants offered, at the trial, "to give in evidence a five-hundred-dollar note, executed by Stewart to Anderson." It was properly rejected. The note had no connection with the case. Whatever its relation might have been to the appellants, it could in no manner affect the appellee.

The court, of its own motion, at the trial, instructed the jury as follows:

"If you find for the plaintiff, and if you believe, from the evidence in this case, that the defendants were guilty of gross and wanton oppression of plaintiff, then, in the assessment of his damages, you are not limited to the amount of his actual pecuniary loss, but you may add, by way of punishment, or punitive damages, such an amount as will be likely to prevent the repetition of such acts."

In considering the propriety of giving this instruction to the jury, we must first settle the question whether the facts charged in the complaint constitute a criminal offence, for which the appellants might be punished, or not; and whether there was any evidence before the jury fairly tending to prove a criminal offence, as alleged in the complaint, to which the instruction was applicable; for, if the facts averred in the complaint amount to a criminal offence, for which the appellants might be punished, it is very clear, according to the decisions of this court, that the jury could not assess exemplary damages in favor of the appellee.

We do not think that the facts averred in either paragraph of the complaint amount to an assault and battery,

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or to an assault, as defined by our statute ; but it appears to us that the facts alleged in the second paragraph substantially charge the misdemeanor known in our law as a rout, which is defined as follows :

“ If three or more persons shall meet together to do an unlawful act upon a common cause, and shall make advances toward the commission thereof, they shall be deemed guilty of a rout, and, upon conviction, shall be fined not exceeding one hundred dollars, or may be imprisoned in the county jail not exceeding sixty days.” 2 R. S. 1876, p. 458, sec. 5.

In the second paragraph of the complaint, it is charged that the appellants, three persons, met together, to do an act which, as charged, is unlawful, in pursuance of a conspiracy, which is equivalent to a common cause, and that they made advances toward the commission thereof. This analysis shows all the elements which are necessary to constitute a rout, as defined by the statute ; and the evidence, which is before us, tends fairly toward proving all the ingredients of the offence. We think, therefore, that the court erred in giving the seventh instruction to the jury. *Taber v. Hutson*, 5 Ind. 322 ; *Butler v. Mercer*, 14 Ind. 479 ; *Nossaman v. Rickert*, 18 Ind. 350 ; *Humphries v. Johnson*, 20 Ind. 190.

Being satisfied that the facts charged in the second paragraph of the complaint amount to a misdemeanor, defined as a rout, we do not enquire whether the facts charged in either paragraph would amount to the felony known as blackmailing, as defined in section 1 of the act of March 10th, 1873, 2 R. S. 1876, p. 449, or not, as such enquiry is not necessary to the decision of the case.

The question of exemplary damages is not settled beyond dispute, even in England. In America, the rule in the several States is not uniform, and amongst text-writers the same difficulty exists. The subject, between Greenleaf and

Sedgwick, is a standing controversy. Mayne adheres to the English rule, and is rather the advocate of punitive damages; while Field, in a late excellent work, doubts the wisdom of the rule. Indeed, the controversy is sometimes one of words, between exemplary damages, an example to warn, and punitive damages, inflicting punishment, both of which are often used as convertible terms, instead of a dispute about principles; and it is not surprising that the discussion continues.

The doctrine of exemplary or punitive damages rests upon a very uncertain and unstable basis. It is almost equivalent to giving the jury the power to make the law of damages in each case; and, in a case where the defendant is a commanding, popular, influential person, and the plaintiff of the opposite character, and the local and temporary excitement or prejudice of the time happens to be in favor of the defendant and against the plaintiff, the jury is apt to be reluctant in giving even pecuniary compensation, without adding anything by way of exemplary or punitive damages; while, in a case in which the characters of the parties and the circumstances are reversed, the jury will be likely to push their power to an unwarranted and unconscionable extent, dangerous to justice and the security of settled rights. Besides, a principle that allows an individual to put the money assessed against another individual, as punishment or a warning example, into his private pocket when he is not entitled to it, whatever public advantages it may have, does not seem to be thoroughly sound.

But, because the jury, in cases where the complaint alleges facts which constitute a criminal offence as well as a civil liability, can not give exemplary or punitive damages, it does not follow that they are restricted to mere naked amount of pecuniary loss. Besides damages for the direct pecuniary injury, as by taking away, destroying,

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or injuring property, the jury may allow damages for indirect pecuniary injury, when it is the necessary consequence of the direct act, and when the averments in the complaint warrant it, as loss of time, delay in business, expenses incurred, etc.; and for injury to a business or profession, reputation or social position; and for physical suffering, as bodily pain, permanent disability, disfiguration, etc.; and for mental trouble, as anguish of mind, sense of shame or humiliation, loss of honor, etc.;—all of which are considered compensatory, and not exemplary or punitive, damages. *Anthony v. Gilbert*, 4 Blackf. 348; *Morford v. Woodworth*, 7 Ind. 83; *Millison v. Hoch*, 17 Ind. 227; *Cox v. Vanderkleed*, 21 Ind. 164; *Moore v. Crose*, 43 Ind. 30; *Ziegler v. Powell*, 54 Ind. 173; *Koerner v. Oberly*, 56 Ind. 284.

Upon a full review of the authorities and the elementary writers, we adhere, with increased confidence, to the rule heretofore adopted by this court, and so frequently approved.

The judgment is reversed, at the costs of the appellee, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

Petition for a rehearing overruled.

ALVORD ET AL. v. SMITH.

PREMIUM.—*Wager.*—*Gaming.*—*Public Policy.*—*Horse-Race.*—*Contract.*—A premium offered by an authorized corporation or a private partnership to the owner of the horse that shall “make the best and quickest time,” or exhibit a certain rate of speed, in a proposed trial of the speed of horses, to be had in a proper place, is not a bet or wager, is not unlawful or against public policy, and may be collected in an action by the owner of the horse which “makes” such “time,” or exhibits such rate of speed.

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PRACTICE.—*Harmless Ruling on Demurrer.*—*Pleading.*—Where the facts alleged in a special paragraph of answer are admissible in evidence under the general denial, which is also pleaded, the sustaining of a demurrer to the former is harmless.

From the Marion Superior Court.

J. S. Tarkington, G. H. Chapman and U. J. Hammond,
for appellants.

*J. E. McDonald, J. M. Butler, F. B. McDonald and
G. C. Butler,* for appellee.

BIDDLE, J.—This case was tried upon the second paragraph of the complaint of John F. Smith against the appellants, which is as follows:

“For further cause of action against said defendants, plaintiff says that said defendants were, in the month of July, 1874, partners, under the style of The Indianapolis Trotting Association, and, as such partners, offered certain premiums for a trotting match, to be held at Indianapolis on or about the 11th day of July, 1874, as follows, to wit: To the owner of the five-year-old horse which should make the best time in said trotting match, a premium of five hundred dollars; to the owner of the five-year-old horse which should make the second best time in said trotting match, a premium of three hundred dollars; to the owner of the five-year-old horse which should make the third best time in said trotting match, a premium of two hundred dollars. That plaintiff duly entered his horse Wolford for said trotting match, and the second premium of three hundred dollars was awarded to the plaintiff as owner of said Wolford, said Wolford having made the second best time in said trotting match. Plaintiff further says that said premium is past due and unpaid, although plaintiff has often demanded payment of the same from defendants. Wherefore plaintiff prays judgment for five hundred dollars, and for all proper relief.”

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A demurrer, alleging insufficiency of the facts stated to constitute a cause of action, was overruled to the complaint.

The answer was, first, a general denial ; second, a want of consideration ; and, third, as follows :

“ The said defendants, and each of them, jointly and separately, for answer to the second paragraph of plaintiff's complaint, say, that the plaintiff, on or about the 11th day of July, 1874, being the owner, and having the control and management, of a certain race horse, named and known as Welford, entered and ran his said horse in a certain race, with certain other race horses, which took place at a place known as The Southern Trotting Park, near the city of Indianapolis, county of Marion, and State of Indiana, and which was run and trotted for certain stakes and wagers in money ; that the sole consideration for the premium demanded, and money sued for, in said second paragraph of the complaint, is money claimed to have been won by said plaintiff by and upon said race, and upon the result of said race, by reason of said horse having been second best in said race. Wherefore,” etc.

A demurrer, for want of alleged facts in the third paragraph of answer to constitute a defence, was sustained.
Reply.

The cause was tried by the court, on the following agreed statement of facts :

“ 1st. In July, 1874, and during the whole of said month, the defendants were associated together under the name and style of The Indianapolis Trotting Association.

“ 2d. The defendants, under the style of The Indianapolis Trotting Association, offered certain premiums for a trotting match or race and trial of speed between horses, to be held at Indianapolis on or about the 11th day of July, 1874, as follows, to wit: To the owner of the five-year-old horse which should make the best and quickest time

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in said trotting match, a premium of five hundred dollars; to the owner of the five-year-old horse which should make the second best and quickest time in said trotting match, a premium of three hundred dollars; to the owner of the five-year-old horse which should make the third best and quickest time in said trotting race, a premium of two hundred dollars.

“ 3d. Plaintiff entered his five-year-old horse Wolford for said trotting match, and paid to defendants one hundred dollars, as an entry fee.

“ 4th. The second premium of three hundred dollars was duly declared to plaintiff, by the persons appointed to act as judges of said match and race, as owner of Wolford, said Wolford having made the second best and quickest time in said trotting match, race and trial of speed.

“ 5th. No part of said premium has been paid.

“ 6th. Said sum of one hundred dollars was paid by plaintiff to defendants, in accordance with the rule of said association, requiring those entering horses to pay for each horse entered for any trotting match, or other race, ten per cent. of the amount offered as premiums, in such trotting match or race.

“ 7th. That five horses, besides plaintiff's said horse, belonging to other persons than the plaintiff, were entered and contested in said trotting match, in harness; the horses all started trotting and racing, each against the others, at the same time, upon the said track, and plaintiff's said horse made the second best and quickest time in three out of five one mile heats, and accordingly said second premium of three hundred dollars was awarded to plaintiff, as owner of said Wolford, by the judges of said trotting match and race, and accordingly said plaintiff, as the owner of said horse Wolford, was declared by the judges of said trotting match, race, and trial of speed, to be entitled to said second premium of said three hundred dollars. The defend-

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ants agree, that, if there is any legal liability, (which they deny,) it is a joint and several liability upon all of them therein."

Upon these facts the court found for the plaintiff the sum of three hundred and twenty-seven dollars and fifty cents.

By a motion for a new trial, which was overruled, and by exceptions to the various rulings of the court, the appellants have reserved the several questions discussed in the briefs of the parties.

Judgment was rendered by the court on the finding, and the defendants below appealed to the court in general term, wherein the judgment was affirmed. Appeal to this court.

The objections taken to the complaint on demurrer are, briefly stated, that it does not aver a consideration for the premium, and that the cause of action is a wager, and can not be recovered at law.

Although the complaint does not contain a direct averment of a consideration for the premium, yet the facts alleged show a sufficient consideration to maintain the action. It is the same consideration as that offered by way of reward to the public, or to any person who shall do some act, obtain something, or accomplish some purpose, which is not unlawful, for the person offering the reward. When the act is done, the thing obtained, or the purpose accomplished, the proposition offering the reward is accepted, and the agreement becomes a contract. *Harson v. Pike*, 16 Ind. 140.

Nor do we think the facts alleged in the complaint show a wager or bet. There is a clear distinction between a wager or a bet, and a premium or reward. In a wager or a bet, there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished, who are the parties who must either lose or win. In a premium or reward, there is but one party until the

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act, or thing, or purpose, for which it is offered, has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager, it is not known till after the event. The two need not be confounded.

Nor can we see anything unlawful, or against public policy, in the facts alleged in the complaint. Under our statutes, 1 R. S. 1876, p. 48, encouraging agriculture, and authorizing public fairs, premiums are offered for the best draft horse, saddle horse, trotting horse, the best stock for this or that purpose. These premiums are certainly not wagers. As well might we call an insurance policy a wager, because it is to be paid on an uncertain event, as to call a premium a wager because we do not know who will be entitled to it until the event happens. We see no difference, indeed, in principle, between a premium offered by an authorized corporation, and one offered by a private partnership. Neither are wagers, nor are they unlawful.

The third paragraph of answer is insufficient. It admits the complaint by not denying it, and avers nothing to avoid it. Indeed, it is nothing more than a circumlocutory averment of another state of facts. The demurrer to it was properly sustained. Besides, it contains nothing but what might have been given in evidence under the general denial.

If we are right in holding the complaint good, it follows that the finding of the court is right; for the facts admitted on trial are substantially the same as those averred in the complaint.

The judgment is affirmed, at the costs of the appellants.

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DAVENPORT v. KING ET AL.

PRINCIPAL AND SURETY.—Promissory Note.—Answer of Suretyship, and Extension of Time.—Notice of Suretyship.—Contract.—Where suretyship is not apparent on the face of the note, and notice thereof to the plaintiff is not averred, an answer by one of several makers of a promissory note, in an action thereon, alleging himself to be merely surety for his co-makers, and that the plaintiff had extended the time of payment of such note, pursuant to a valid contract therefor between himself and such co-makers, is insufficient.

From the Elkhart Circuit Court.

M. F. Shuey and J. M. Vanfleet, for appellant.

J. H. Baker and J. A. S. Mitchell, for appellees.

PERKINS, J.—The appellees sued John Davenport and Abraham L. Davenport on a promissory note, dated April 14th, 1875, due sixty days after date, for one thousand dollars.

Abraham L. Davenport answered as follows :

1. The general denial.
2. Payment.
3. “ That he was and is surety on said note described in the complaint ; that the plaintiffs were and are commission-merchants, engaged in buying and selling grain and produce, at Toledo, Ohio ; that the defendant John Davenport, the principal maker of said note, was engaged in buying and shipping grain and produce from Indiana to Toledo, Ohio ; that, after the maturity of said note, to wit, on the 25th day of October, 1875, said defendant John and said plaintiffs entered into an arrangement and agreement that the defendant John should ship grain and produce to the plaintiffs at Toledo, Ohio, to be sold on commission, the plaintiffs to receive one and one-half cents per bushel, and that the time for the payment of said note should be extended so long as he continued to ship them grain, and that said John should from time to time apply the profits of said business that he could spare to the pay-

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ment of said note ; that, in pursuance of said agreement, said John continued to ship large quantities of grain and produce to the plaintiffs, which they sold from time to time and made large profits thereon ; that he continued to ship grain and produce to plaintiffs until the month of June, 1876, and that the time of payment of said note was extended, in pursuance of said agreement, until that time ; all without the knowledge or consent of this defendant. Wherefore he says he was released from said suretyship."

4. "Defendant says he was and is surety for defendant John on said note described in the complaint ; that the defendant John, at and after the maturity of said note, for more than a year continuously, was engaged in buying and shipping grain and produce to the plaintiffs, at Toledo, Ohio, to sell on commission ; that, after the maturity of said note, the plaintiffs received from said John large quantities of grain and produce, and sold the same, and were indebted to the defendant John from time to time many thousands of dollars therefor, and that they might and should have cancelled said note, but neglected and refused so to do. Wherefore he demands judgment for costs, and all other proper relief."

The plaintiffs demurred severally to the third and fourth paragraphs of answer, for want of facts. The demurrer was sustained to the third paragraph, and overruled to the fourth, and exceptions entered.

The third paragraph did not allege knowledge by the plaintiffs of the suretyship of the appellant.

Reply in denial, and in a second paragraph, by way of confession and avoidance.

The cause was submitted to the court for trial, without a jury, and there was judgment for the plaintiffs.

A motion for a new trial, stating for causes,—

1. Excessive damages ; and,

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2. Judgment against evidence and law ; was overruled, and exceptions taken.

A bill of exceptions contains the evidence.

A. L. Davenport alone appeals.

The assignment of errors is as follows:

1. The court erred in sustaining the demurrer to the third paragraph of the appellant's answer ;

2. The court erred in overruling the motion for a new trial.

The court did not err in sustaining the demurrer to the third paragraph of appellant's answer. The fact of suretyship was not apparent upon the face of the note. Both signers upon it appeared to be principals. In such a case it is decided, in *Neel v. Harding*, 2 Met. Ky. 247, that, to maintain the defence of suretyship, and discharge by extending time, against the plaintiff, "the defendant must allege and prove that the plaintiff had notice that he was surety in the note sued upon," at the time he made the agreement with the other maker of the note, to give further time to pay.

This doctrine is founded upon justice and equity. It is thus stated in the opinion in the case already quoted from : "It is a just and reasonable doctrine, that where the parties make an instrument which is assignable, and upon the contract itself hold themselves out as principals, they are to be regarded and treated, both by the assignor and assignee, as occupying the attitude in which they have represented themselves to stand, unless the holder has knowledge that some of them are the sureties of the others. Good faith requires that the holder of the paper should have a right so to regard and treat them. It would be manifestly unjust to subject him to the legal consequence of discharging the sureties to the note by an agreement with the principal, when he was ignorant of the relation in which the parties stood to each other, and had a right to consider them all as

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principals. If they were all principals, an agreement with one of them to give further day of payment would not operate to release or exonerate the others. Such an agreement can not be allowed to have any more effect than it would have if the promisors were all actually, as they all appear to be, principals in the note, unless the holder, at the time he entered into the agreement, had notice that the parties who claim to be sureties did occupy that attitude on the paper."

Brandt, in his recent work on suretyship and guaranty, p. 22, says: "The great weight of authority and of reason is in favor of the law as above stated." *Orvis v. Newell*, 17 Conn. 97; *Wilson v. Foot*, 11 Met. 285; *Murray v. Graham*, 29 Iowa, 520; *Oxford Bank v. Haynes*, 8 Pick. 423; *Grafton Bank v. Kent*, 4 N. H. 221; *Nichols v. Parsons*, 6 N. H. 30. See Bick. Civil Pr. 472.

It will be unnecessary to consider the question of extension of time, as no ruling of the court during the trial was excepted to; the only question arising upon the overruling of the motion for a new trial is as to the sufficiency of the evidence to establish the second and fourth paragraphs of the answer. But two witnesses were examined. It is not worth while to copy their testimony. It is lengthy, but in no manner tends to prove the allegations in the second and fourth paragraphs of answer.

The court did not err in overruling the motion for a new trial.

Judgment affirmed, with costs.

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ESTOPPEL.—Partition.—Married Woman.—Descent.—Effect of Judgment of Foreclosure by Default.—Widow.—Heirs.—Sheriff's Sale.—Pleading.—In

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an action by a married woman and her second husband, to obtain partition of lands descended from her deceased former husband, against one alleged to be the owner of the undivided two-thirds by virtue of a purchase by him at a sheriff's sale of such lands on a decree of foreclosure of a mortgage thereon, executed by the decedent, during the existence of such marriage relation, to a third person, the defendant answered, alleging that the plaintiff was estopped because of the facts, that, in such foreclosure suit, to which she and the children of such decedent were defendants, the complaint alleged that the defendants were "heirs" of the decedent, and that, on default, a decree of foreclosure was rendered, adjudging "that from and after" sale thereon "the equity of redemption of the said defendants be forever barred," etc.

Held, on demurrer, that the answer is insufficient.

Held, also, that a widow is not an "heir" of her husband, in the general sense of that term.

Held, also, that such judgment by default concluded the plaintiff only as to her rights as an alleged "heir," and not as the widow, of the decedent.

SAME—*Estoppel in Pais*.—An answer in such action, alleging as matter of estoppel, that the plaintiffs were both present at such sheriff's sale to the defendant, without disclosing their pretended title, and that they had received one-third of the purchase-money paid by the defendant, is insufficient on demurrer.

SAME.—*Subsequent Coverture*.—The rule, that a married woman can not divest her title to real estate by an estoppel *in pais*, applies with greater force to an attempt to estop her from claiming title to lands descended from a deceased former husband by means of matter *in pais* existing during a subsequent coverture.

SAME.—*Practice*.—*Demurrer Carried Back*.—The sufficiency of an answer is questioned by a demurrer questioning the sufficiency of a reply thereto.

From the Vanderburgh Circuit Court.

A. Dyer and *M. R. Anthes*, for appellant.

S. R. Hornbrook, for appellees.

NIBLACK, J.—This was a suit for partition by Anna Maria Heberer and her husband, Peter Heberer, against Peter Unfried.

It was shown by the first paragraph of the complaint, that the plaintiff Anna Maria was married to Andreas Roth in the year 1845; that in 1864 Roth died, leaving her, the said Anna Maria, as his widow, and the children whose names are given; that the said Roth, at the time of

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his death, was the owner of a certain described tract of land containing forty acres lying in Vanderburgh county; that the said Anna Maria intermarried with the said Peter Heberer, her co-plaintiff, in 1865; that, as the widow of said Roth, the said Anna Maria became the owner in fee of one undivided third part of said real estate, and was still the owner thereof as a tenant in common with the defendant, who owned the remaining two-thirds of the same; that the defendant had purchased his interest in said real estate under a decree of the Vanderburgh Circuit Court, rendered in 1866, in an action to foreclose a mortgage on the same executed by said Roth on the 1st day of September, 1855, and while the said Anna Maria was his wife, said purchase having been made in 1867; and that the defendant claimed to be the exclusive owner of all of said real estate.

Prayer for partition and that the title of the said Anna Maria might be quieted.

There was a second paragraph of the complaint, but it was withdrawn before the issues were finally closed.

The defendant answered in three paragraphs:

1. That the plaintiffs were estopped from asserting any claim to said real estate, because, on the 28th day September, 1866, in an action in said Vanderburgh Circuit Court, in which one Anna Burkhart and others were plaintiffs, and the said Anna Maria Heberer, and her said children, and the said Peter Heberer, were defendants, for the purpose of foreclosing the mortgage executed by the said Roth and mentioned in the complaint, in which it was charged in the complaint in that action that the defendants were the heirs of said Roth, and in which the said Anna Maria was duly summoned as a defendant and made default, it was ordered and adjudged that said real estate be sold to pay said mortgage, and "that from and after such sale all equity of redemption of the said defendants be forever

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barred and foreclosed," and on the 7th of January, 1867, the defendant had become the purchaser of said real estate at a sheriff's sale, under said judgment of foreclosure, for the sum of eleven hundred dollars, and had received a sheriff's deed for said real estate, and was in possession under said deed, claiming the land as his own.

2. That the plaintiffs were present at the sheriff's sale mentioned in the first paragraph of this answer, and encouraged and permitted the defendant to become the purchaser of said real estate without setting up any claim thereto on their part, thereby inducing the defendant to become such purchaser under the belief that he was acquiring, and had acquired, a perfect title to the whole of said real estate, and whereby the plaintiffs were estopped from setting up any claim to said real estate.

3. That, because of facts set up substantially the same as in the second paragraph, with the additional allegation, that the plaintiffs had received one-third of the purchase-money paid by the defendant, the plaintiffs were estopped from asserting any claim to said real estate.

The plaintiffs separately demurred to each paragraph of the defendant's answer, and their demurrer was sustained to the first paragraph and overruled to the second and third.

The plaintiffs then replied to the second and third paragraphs :

1. In general denial ;

2. That, at the time of the execution by the said Roth of the mortgage mentioned in the complaint, the said Anna Maria was the wife of the said Roth ; that the said Roth departed this life in 1864, leaving her as his widow, and three children, still living ; that, upon the death of the said Roth, the said Anna Maria became the owner by descent of one-third of the real estate in suit ; that in 1865, and before the suit was brought to foreclose said mortgage,

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the said Anna Maria intermarried with her co-plaintiff, Peter Heberer, who had ever since been her lawful husband, and that ever since the death of the said Roth she had been the owner of one-third of said real estate by virtue of her marriage with said Roth; and not otherwise.

The defendant demurred to the second paragraph of the reply, but his demurrer was overruled.

The plaintiffs thereupon withdrew the second paragraph of their complaint and the first paragraph of their reply, and the defendant standing on his demurrer to the second paragraph of the reply, judgment for the partition of said real estate was rendered, directing, amongst other things, that one-third in value of said real estate be set off to the said Anna Maria; and, the commissioners reporting that such real estate was not susceptible of partition without injury, an order for the sale of the same was made, and for a division of the proceeds, according to the respective rights of the parties as established by the judgment of partition.

The first question to which our attention is invited is that of the sufficiency of the first paragraph of the defendant's answer; and, in passing upon that question, we have only to decide whether the plaintiff Anna Maria was estopped by the judgment of foreclosure, to which she was a defendant, from setting up her claim, as widow of Andreas Roth, to the land in controversy.

In the complaint in the foreclosure proceeding, it was not alleged that she had joined in the execution of the mortgage, nor that the mortgage was given to secure the purchase-money of the mortgaged lands, nor was any other fact stated tending to negative her claim to such lands as widow of the deceased mortgagor. It was not even averred or shown in that complaint, that she was the widow of such mortgagor. The natural inference, from the allegation that she was one of the heirs of the mortgagor, in the connection in which it was made, would be, that she had

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some inheritable interest in the mortgaged lands, which might or would be affected by the foreclosure of the mortgage, and not that any right she had as widow was attacked. A widow is an heir of her deceased husband only in a special and limited sense, and not in the general sense in which that term is usually used and understood. When the said Anna made default in the action for foreclosure, nothing was taken against her as confessed, nor could have been, which was not alleged in the complaint; and, as nothing was alleged hostile to her claim as widow, it follows that nothing concerning her claim as such widow was concluded against her by the judgment of foreclosure. This proposition we regard as too well founded in principle to need the citation of authorities to sustain it. See, however, *Helms v. Love*, 41 Ind. 210; *Fletcher v. Holmes*, 25 Ind. 458; *Minor v. Walter*, 17 Mass. 237.

A judgment by default is conclusive of all that is properly alleged in the complaint, but nothing more; and, as a general rule, only upon the defendant in the character in which he is sued. *Bigelow Estoppel*, 65; *Herman Estoppel*, 191; *Cronan v. Frizell*, 42 Ill. 319; *Mansfield v. Hoagland*, 46 Ill. 359.

We are, therefore, of the opinion, that the court did not err in sustaining the demurrer to the first paragraph of the answer.

There is a question between counsel as to whether the plaintiffs' demurrer to the second and third paragraphs of the answer was overruled or not, owing to some obscurity in the record; but, as the defendants demurrer to the second paragraph of the reply necessarily raised the question of the sufficiency of those paragraphs, we will assume that the demurrer to them was overruled. *Batty v. Fout*, 54 Ind. 482; *Buskirk's Practice*, 179; *Wiley v. Howard*, 15 Ind. 169.

This court has recently decided that a married woman

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can not divest her title to real estate by an estoppel *in pais*. *Behler v. Weyburn*, 59 Ind. 143.

This rule, we think, if possible, applies with greater force to a married woman, under the coverture of a second marriage, as regards lands descended to her as the widow of her first husband, which she is incompetent to convey, even with the concurrence of her second husband. *Knight v. McDonald*, 37 Ind. 463; *Vinnedge v. Shaffer*, 35 Ind. 341; 1 R. S. 1876, p. 411, sec. 18; *Schlemmer v. Rossler*, 59 Ind. 326.

We are, therefore, constrained to hold, that both the second and third paragraphs of the answer were bad on demurrer.

This conclusion renders it unnecessary that we shall consider the sufficiency of the second paragraph of the reply, as it is a well settled rule of practice, that a bad reply is good enough for a bad answer.

We see no error in the record.

The judgment is affirmed, at the costs of the appellant.

SUITS v. MURDOCK ET AL.

TRESPASS.—Defence.—Pleading.—Supervisor.—Township Trustee.—Opening Highway Through Enclosed Lands.—Notice to Owner to Move Fence.—Where, in an action by the owner of land for damages for unlawfully entering upon his premises and throwing down his fences, the defendants justify by alleging that the acts complained of were committed by them as township trustee, supervisor and laborers, in opening a highway duly located by order of the proper board of commissioners, it is necessary to allege also, that the notice required by section 41 of the highway act, 1 R. S. 1876, p. 534, has been given.

SAME.—County Commissioners.—Order Locating Highway.—Viewers.—Reviewers.—Judgment Unappealed From.—Jurisdiction.—Waiver.—Description of Route.—Record of Highway.—Damages.—Remonstrance.—Tender.—

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From the record of the county commissioners, attached to the answer, it appeared, that, upon a legal petition for the location of the highway in question, viewers were appointed, who reported to the proper board of commissioners, that they had "carefully viewed the said proposed route, * and * believe the location will be of public utility, and thirty feet wide," describing the route particularly; that such report was received and confirmed by the board; that, upon remonstrance, reviewers were appointed, who reported to such board, that they had found that the highway proposed would "be of utility" and had "laid it out thirty feet wide," describing the route as described by the viewers, and allowing a certain sum to the remonstrant as damages "to be paid by the original petitioners, or persons benefited," etc.; that thereupon the board had made an order, that, "whenever the original petitioners shall pay to" the remonstrant the said damages, "then the said highway shall be located and established on said route, thirty feet in width, and that the said road shall be opened accordingly," etc., and that the proper trustee be notified thereof; and that such notice had been given, such damages tendered, and the tender kept good.

Held, that the board had jurisdiction, and, no appeal having been taken from their order, its effect could only be avoided by showing it to be void.

Held, also, that, by failing to appeal, any question as to the order for payment of the damages assessed was waived.

Held, also, that an objection that the highway should have been ordered to be taken equally from adjoining proprietors is of no force, it not appearing that the route was upon a line between adjoining proprietors.

Held, also, that the viewers only, and not the reviewers, have authority to lay out and mark a highway.

Held, also, that a board of commissioners has no power to lay out and mark a highway.

Held, also, that, where the report of viewers specifies the route of the highway to be on a straight line between permanent specified points, such an order as was made in this case is sufficient.

Held, also, that the record of the highway laid out by the viewers could not be made by the board until after the report of the reviewers.

From the Tippecanoe Superior Court.

J. M. LaRue and *F. B. Everett*, for appellant.

J. D. Gougar, *W. D. Wallace* and *A. Rice*, for appellees.

PERKINS, J.—Suit by the appellant, against the appellees, to recover damages occasioned by a trespass of the latter upon the lands of the former.

The complaint alleges, that, on the 25th day of December, 1875, the plaintiff was the owner, and in the peaceable

possession, of a certain piece of land, describing it; that, on the day aforesaid, the defendants, without license, etc., entered upon said land, and threw down his fences, etc., to his damage, etc.

The defendants answered, that a highway had been laid out through said land, and ordered to be opened, and that the defendants were, one of them the township trustee of the township in which said road was laid out, one of them the road supervisor of the road district, etc., the others were inhabitants of said road district, and were acting in obedience to said supervisor, and that they all entered upon said land, and removed said fences, in the execution of the order of the board of commissioners of said county for the opening of said highway.

A transcript of the proceedings and judgment in the commissioners' court was filed as an exhibit with the answer.

A demurrer to the answer was overruled, and exception entered.

Reply, to which a demurrer was sustained, and final judgment rendered in favor of the defendants.

The record shows that a legal petition for the highway was presented to the board of commissioners of Tippecanoe county; that the viewers were appointed, who reported in favor of the highway. The report described the route of the highway, as described in the petition for it, and concluded as follows:

“And the said viewers say, upon their oath, that they have carefully viewed the said proposed route for road, and report to your honorable body that they believe the location will be of public utility, and thirty feet wide.”

The report was received and confirmed by the commissioners, and the viewers discharged.

A remonstrance was filed, and reviewers appointed, who also reported favorably. We copy their report, and the order of the board thereon:

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“ And afterward, at the September term, 1875, of the board of commissioners of said county, come Nelson Lutz and Bennett Foresman, two of the reviewers heretofore appointed at last term of this court to review a proposed highway situate in Tippecanoe county, Indiana, as follows, to wit:

“ Said road to commence at the south-east corner of the north-east quarter of section 27, in town 22, range 6 west, and running with a road running from the Midway school-house, on the Pleasant Hill, Shawnee Mound and Lafayette gravel road, due west, through the middle of section twenty-six, running to the said south-east corner of the north-east quarter of said section twenty-seven, and the said proposed road to run due west through the middle of said section twenty-seven, about two hundred and sixty rods, intersecting a road running south-west into Fountain county, said road running through the lands owned by Thomas A. Odell, G. W. Odell, John Mulhollen and William Mulhollen, and Daniel Christman; also, Alexander Suits, Job Mulhollen, Michael Leyden, W. P. McMillen, Franklin Lester, and William Howey, said road to be thirty feet wide; and file their report, which is in the words and figures following, to wit:

“ ‘ We, the undersigned reviewers, appointed by your honorable body, at your June session, 1875, beg leave to report that, after being qualified, we proceeded to make said review, and find that the within described location of public highway will be of utility, and laid it out thirty feet wide, as follows: Commencing at the south-east corner of the north-east quarter of section 27, township 22 north, range 6 west, and running with a road running from the Midway school-house, on the Pleasant Hill, Shawnee Mound and Lafayette gravel road, due west through the middle of section twenty-six, running to the south-east corner of the north-east quarter of said section twenty-seven, and to run

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due west through the middle of said section twenty-seven, about 260 rods, intersecting a road running southwest, into Fountain county.

“ ‘We also find for the remonstrator, Alex. Suits, the sum of \$25.00 damages, to be paid by the original petitioners, or persons benefited thereby.

“ ‘BENNETT FORESMAN,

“ ‘NELSON LUTZ.’

“And it appearing to the board that said reviewers have in all things discharged their duties well, it is therefore ordered that they be discharged from their said trust. And it is further ordered by the board, that, whenever the original petitioners shall pay to said Suits the sum of twenty-five dollars, then the said highway shall be located and established on said route thirty feet in width, and that said road shall be opened accordingly, and kept in repair, and that the trustee of Wayne township be notified of this fact.”

No appeal was taken from the judgment and order of the board.

The notice provided for in the order was given. The twenty-five dollars were tendered, and the tender was kept up by bringing the money into court. The appellees entered upon the premises to open the road, and this suit against them for trespass was instituted.

As the board of commissioners had jurisdiction in the premises, and their judgment was not appealed from, and it is here attacked collaterally, it must be shown to be void, to defeat its operation.

The objections made to it by appellant are :

1. That the damages should have been ordered to be paid out of the county treasury ;
2. That it does not appear that the thirty feet for the road were taken equally from adjoining proprietors ;
3. That the viewers did not lay out the road ;
4. That the board did not lay out the road.

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The first objection was waived by failing to appeal.

The second objection is without force, because it does not appear by the record, that the line of the road, or any part of it, was intended to be located on the line between adjoining proprietors; and, did it, the objection does not show the extent of the deviation.

The third objection must be tested by the following sections of the statute:

“SEC. 16. The auditor of such county shall issue a precept to the sheriff thereof, commanding him to notify such viewers of the time, place and object of their meeting, and such viewers, at such time and place, after having taken an oath, before some officer authorized to administer oaths, to faithfully perform their duties, shall proceed to view the highway, or such change; and if they shall deem the highway to be located, or the change to be made, of public utility, they shall lay out and mark the same on the best ground, not running through any person's inclosure of one year's standing, without the owner's consent, unless upon examination, a good way cannot otherwise be had: *Provided*, That where the road is laid out upon the line dividing the land of two individuals, each shall give half the road.

“SEC. 17. Such viewers, or a majority of them, shall make a report of their proceedings at the ensuing session of the board of commissioners of the county in which such location, change or vacation may be made, giving a full description of such location, change or vacation, by routes and bounds and by its course and distance, except that in case of the vacation of a road, or any part thereof, such description only as will designate it clearly, shall be required; and in such case, a copy of the order vacating such highway shall be transmitted by the proper auditor to the trustees of the townships in which such vacated highway is situate, who shall cause the supervisors thereof to be notified accordingly.”

The viewers did not formally lay out and mark the highway, but they reported that they believed a location on the site petitioned for, and particularly described, would be of public utility, and specified its width—thirty feet. The reviewers had no power, as it was no part of their duty, to lay out the highway. *Hughes v. Sellers*, 34 Ind. 337.

The order of the commissioners does not purport to “lay out and mark” the highway, but directs, that, whenever the twenty-five dollars are paid, “then the said highway shall be located and established on said route, thirty feet in width.”

The highway might have been legally laid out and established before the damages assessed were paid; but it could not have been opened and used till that had been done.

Section 25 of the highway act, 1 R. S. 1876, p. 533, enacts as follows:

“SEC. 25. No such highway shall be opened, worked, or used, until the damages assessed therefor shall be paid to the persons entitled thereto, or deposited in the county treasury for their use, or they shall give their consent thereto in writing filed with the auditor of such county.”

We do not find any provision in the statute authorizing the board of commissioners to lay out and mark highways; these acts are to be performed by the viewers, and the duty of the board is to “cause a record thereof to be made,” and order the road to be opened and worked. If a remonstrance is filed, and is unsuccessful, the record will be made by order of the board afterward. Sec. 18 of the act, *supra*.

The record of a road is not made till after it has been laid out by the viewers.

If the report of the viewers do not state that they laid out and marked the road, it might be held insufficient on appeal. *Hughes v. Sellers, supra*; *Wilson v. Whitsel*, 24 Ind. 306. But it seems to us, that, in a case like the present, where the

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termini of the proposed road are definitely fixed by reference to known and permanent objects, and its course is designated and fixed on a straight line between such permanent objects, that is a sufficient laying out and marking of the highway, within the meaning of the statute, especially when the existence of the highway is attacked collaterally. *Ruston v. Grimwood*, 30 Ind. 364.

As to the order of the board, we think it should be construed as meaning to express and direct that simply which the board had power to direct, viz., that the road should not be opened and worked till the twenty-five dollars were paid. At all events the proceedings in laying out the highway were not void. *Sparling v. Dwenger*, 60 Ind. 72; *Weston v. Lumley*, 33 Ind. 486; *The State v. Schultz*, 57 Ind. 19.

There is, in this case, however, a reason, not depending upon the validity of the proceedings before the commissioners, why the judgment must be reversed. It is enacted by section 41 of the highway act, above quoted from, that:

“SEC. 41. Whenever any public highway shall have been laid out through any inclosed land, the supervisor shall give the occupant of such land, or the owner, if a resident of the road district, sixty days’ notice in writing, to remove his fence; but such owner or occupant shall not be compelled to move such fence between the first day of April and the first day of November; and if such fence is not moved pursuant to such notice, such supervisor shall cause the same to be done.”

In this case, the answer does not allege that notice was given to the occupant or owner of the land, pursuant to said section 41. *Ruston v. Grimwood*, *supra*.

The judgment is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

Swift v. The State, *ex rel.* Clark.

SWIFT v. THE STATE, EX REL. CLARK.

CONTEMPT.—*Proceeding against Clerk for Failure to Pay Over Money.—Arrest.—Decedents' Estates.—Affidavit.—Liability of Clerk and Sureties.—Criminal Law.*—In a proceeding in the name of the State, on the relation of an affiant, against the clerk of a circuit court, for contempt of an order made by that court, the verified complaint alleged, that, in a proceeding by the relator against a distributee of the estate of a certain decedent, the court had adjudged that the relator was entitled to certain moneys theretofore paid to the clerk for such distributee, and ordered that the same should be paid by the clerk to the affiant ; and that demand therefor had been made upon the clerk, by the relator, prior to the making of such order, which he, in contempt of the court, had refused to obey.

Held, on demurrer, that the complaint was insufficient.

Held, also, that the demand alleged was insufficient.

Held, also, that, under the act of March 9th, 1875, 2 R.S. 1876, p. 17, the clerk and his sureties were liable, on his bond, for a failure to pay such money to the person entitled thereto, but that he can not be proceeded against for contempt of court in refusing to obey such order.

Held, also, that, for fraudulently withholding such money, he is liable to prosecution for a felony.

SAME.—*Fine.—Judgment.—Common Schools.*—The fine imposed by a court as a punishment for a contempt of its authority must be for the use of the common school fund of the State, and not for the benefit of the relator.

From the Franklin Circuit Court.

B. F. Davis, for appellant.

W. M. McCarty, for appellee.

NIBLACK, J.—At the April term, 1876, of the court below, in a proceeding entitled “The State of Indiana, on the relation of Ellen M. Clark, against Ferdinand S. Swift,” the relatrix filed in said court a complaint verified by her affidavit, which, with some slight verbal alterations, was as follows :

“Ellen M. Clark complains and shows to the court now here, that heretofore, to wit, on the 14th day of March, 1871, William J. Peck paid into this court, upon his final settlement as administrator of the estate of Isaac Price, de-

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ceased, as appears by the records of this court, for one Isaac L. Price, one of the distributees of said estate, six hundred and thirty-eight dollars and seventy-nine cents, and, also, some cents over the sum of forty-one dollars; and that afterward, upon a suit by and between the said Ellen M. Clark, against the said Isaac L. Price and others, involving the right and title of the said Ellen M. to said moneys by transfer of the same by the said Isaac L. Price to her, it was, by the judgment of said court, established and adjudged, that the said Ellen M. Clark was entitled to said moneys, to wit, the sum of six hundred and thirty-eight dollars and seventy-nine cents, and the clerk of this court was, by the judgment of the court, ordered and directed to pay said moneys to the said Ellen, which said judgment was rendered on the 20th day of May, 1876, and the said Ellen shows that said moneys were then, and still are, in the possession of Ferdinand S. Swift, the clerk and officer of this court, and that she did, on the 8th day of May, 1876, demand of said Swift said moneys, the same being then in his hands and paid into court, who did then and there refuse to pay her the same, acknowledging at the same time that he had said moneys, in gross contempt of this court and in defiance of its order herein, and she brings this matter to the notice of the court and asks that he be amerced in the amount of said moneys so awarded her by the judgment of this court, for her use, and be committed until the same is paid her, and for judgment against him for the sum of six hundred and forty dollars and costs."

Upon the filing of this complaint, a writ of attachment was issued for the defendant, Swift, and he was brought into court in obedience to said writ. He then moved the court to dismiss the attachment proceedings against him for want of a sufficient affidavit to authorize or support such proceedings, but his motion was overruled. He thereupon demurred to the complaint for want of sufficient

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facts to constitute a cause of action against him, but his demurrer was overruled.

After the overruling of his demurrer, the defendant answered, setting up the proceedings in detail, accompanied by copies of the pleadings and judgment in the case in which the relatrix alleged her right to the money claimed by her had been established, showing that he had not been a party to such proceedings, and alleging that those proceedings were so irregular and unauthorized that they would not afford him any protection against the claims of others if he should pay said money to the relatrix, and charging that she was a married woman and insolvent, and had declined to give him a bond of indemnity, or other security, for the repayment of the money in the event that it should be made to appear that she was not entitled to receive the same. Also disclaiming any intention to disobey any order of the court lawfully made in the premises.

The cause coming on to be heard on the complaint and answer, the court found that the relatrix was entitled to the money demanded in her complaint, that said money was then in the hands of the defendant, as clerk of said court, and that the defendant had failed and refused, after demand, to pay said money to the relatrix.

After overruling motions for a new trial and in arrest of judgment, it was ordered and adjudged by the court, that the defendant was in contempt of the court in disobeying its order and judgment establishing the relatrix's right to the money claimed to be due her by the complaint, and that he be amerced in the sum of six hundred and thirty-eight dollars and seventy-nine cents, to be paid to the relatrix, with costs of suit, and that he stand committed to the county jail for the period of ninety days, unless sooner discharged according to law.

While this was nominally a proceeding in attachment against the defendant for an alleged contempt of the au-

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thority of the court, its real object appears to have been the recovery of a sum of money by the relatrix from the defendant, to which she claimed her right had been established by certain legal proceedings.

In consequence of the duplex character of the complaint, the whole proceeding seems to have been treated by the court as partly a criminal and partly a civil action.

It is alleged in the complaint, that the relatrix demanded of the defendant the money claimed to be due her, on the 8th day of May, 1876, and that her right to the money thus demanded was established on the 20th day of May, 1876. It was then made to appear that the relatrix demanded the money some twelve days before her right to it had been established, and before the judgment was rendered which it was charged the defendant had disobeyed. For this reason, if for no other, the complaint did not show the defendant to have been guilty of any contempt of the authority of the court.

But, suppose it had been alleged that the demand was made, and the defendant's refusal to pay had occurred, after the judgment in question was rendered, would such an allegation have laid a sufficient foundation for proceedings in attachment as for a contempt? We think not. The act of March 9th, 1875, 2 R. S. 1876, p. 17, declares the liability of clerks on their official bonds for all moneys paid into court, under its order, to the person entitled to receive said money from them.

The clerks are thus made the custodians of such moneys, and not the courts. The refusal, therefore, of a clerk to pay out any such money to any person entitled to receive the same, constitutes a breach of his official bond, for which a civil action may be maintained as in other cases of improper refusal to pay out money in his hands as such clerk; and, when such money is fraudulently withheld, the clerk may be prosecuted for a felony. 2 R. S. 1876, p. 450. But we

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have no statute or precedent making even such fraudulent withholding a contempt of the authority of the court, of which he is the clerk.

In our opinion, the complaint before us did not, in any respect, make out a case of contempt of the authority of the court against the defendant.

Neither can the proceeding be sustained as a civil action. The complaint did not state facts which authorized either the arrest or the imprisonment of the defendant as a fraudulent debtor. It is only in cases of fraud that a debtor can be either arrested or imprisoned. See Bill of Rights, 1 R. S. 1876, p. 24, sec. 22; also 2 R. S. 1876, p. 84, sec. 104.

As the complaint was insufficient, it is unnecessary that we shall review the subsequent proceedings upon it.

We may remark, however, that, if it was the intention of the court to "amerce" or fine the defendant for a supposed contempt of its authority, then the fine ought to have been imposed, as in other criminal proceedings, for the use of the school fund of the State, and not of the relatrix. If it was the intention to render a judgment, as in a civil action, then there was nothing either in the complaint, or in the finding of the court, to justify an order for the imprisonment of the defendant.

In any view of the case, the judgment was both anomalous and erroneous.

The judgment is reversed, at the costs of the relatrix, and the cause remanded, with instructions to the court below to dismiss the proceedings, and discharge the defendant

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PRACTICE. — *Newly-Discovered Evidence.*—*New Trial.*—*Supreme Court.*—

Where the evidence given on the trial of a cause is not in the record, on

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appeal to the Supreme Court, no question is presented as to the overruling of a motion for a new trial, based upon the alleged ground of newly-discovered evidence.

From the Henry Circuit Court.

T. B. Redding, for appellant.

J. Brown and *J. M. Brown*, for appellee.

PERKINS, J.—Suit by the appellee, against the appellant.

The complaint was in two paragraphs.

The first was for the amount of a note placed by the appellee with the appellant, as collateral security, and which he had appropriated to his own use, and refused, after the principal had paid the debt on which he was surety, to account for, etc.

The second paragraph contained the common counts at common law, with a bill of particulars.

The paragraphs were severally demurred to, as not containing sufficient facts.

The demurrer was overruled, and exceptions entered.

The paragraphs were severally good.

The first contained a definite description of the note, with the other necessary averments.

The second contained a bill of particulars, duly made part of the paragraph.

Answer :

1. General denial ;
2. By way of set-off.

Reply.

The issues were tried by a jury, and a verdict returned for the plaintiff.

A motion for a new trial was overruled, and exceptions reserved.

One of the grounds of the motion was newly-discovered evidence.

The alleged errors assigned are :

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That the court erred in overruling the demurrers severally to the paragraphs of the complaint, and in overruling the motion for a new trial.

We have already seen that the first error does not exist.

The only point made by counsel in support of the alleged error in overruling his motion for a new trial is, that the newly-discovered evidence entitled him to such trial. The evidence given on the trial not being in the record, we can not say that the newly-discovered evidence was not merely cumulative, nor that it might probably produce a different result on another trial. Hence we can not say the court erred in refusing a new trial on this ground. 2 R. S. 1876, p. 181, note 2.

The judgment is affirmed, with costs

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63	87
140	198
63	87
150	312

WITNESS.—*Partnership.*—*Action by Surviving Partner.*—The defendant, in an action by a surviving partner on a partnership chose in action, is a competent witness in his own behalf.

SAME.—*Administrator of Deceased Partner not a Proper Co-Plaintiff.*—The administrator of the estate of the deceased partner is neither a necessary nor proper party plaintiff, and the defendant can not, by making such administrator a co-plaintiff, be deprived of his right to so testify.

SAME.—*Misjoinder of Parties.*—*Waiver.*—*Decedents' Estates.*—*Judgment.*—No judgment, either for or against such estate, can properly be rendered in such action, but such misjoinder of the administrator is waived by a failure to object thereto.

From the Bartholomew Circuit Court.

F. T. Hord, for appellants.

R. Hill, for appellees.

BIDDLE, J.—Complaint by John Nicklaus, surviving partner of the firm of John Nicklaus & Co., composed of the

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said Nicklaus and Bernard Jacobs, and Christian Pfeifer, administrator of the estate of said Bernhard Jacobs, deceased, against Samuel Dahn and George Dahn, on three several promissory notes, purporting to be executed by the said Dahns, payable to the order of John Nicklaus & Co., and also upon an account for merchandise, amounting to six hundred and forty-nine dollars.

Answer filed; issue joined; trial by the court; finding in favor of the appellee George Dahn, and against the appellee Samuel Dahn. Judgment accordingly.

The appellants complain of two rulings by the court, which may be regarded as one, namely, that the court allowed each of the appellees to testify at the trial; and the third, that the evidence does not support the finding; all of which are reserved in the record, and discussed in their brief.

It appears to us that the appellees were competent witnesses. They were clearly competent against the surviving partner, Nicklaus; and no judgment could be rendered in the case, either for or against the estate represented by Pfeifer. The meritorious right of action was in Nicklaus, the surviving partner. Pfeifer, the administrator, could have no interest in the judgment recovered till after the final settlement of the firm of "John Nicklaus & Co." He was an unnecessary party; but, as no advantage was taken of it, the point is waived. The appellants could not, merely by making an unnecessary party plaintiff, thereby cut off the right of the appellees to become witnesses in the case.

The general rule is, that neither husband nor wife can be a witness for or against each other; yet, when they jointly sue, or are jointly sued, and have separate interests, each is a competent witness—the husband for himself, and the wife for herself—although the testimony of either may benefit the other. *Howell v. Zerbee*, 26 Ind. 214; *Lockwood v. Joab*, 27 Ind. 423; *Haskit v. Elliott*, 58 Ind. 493.

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Upon the same principle, we think the appellees in the case we are considering were competent witnesses. The general rule is, that all parties are competent witnesses for themselves; the appellees in this case have not been brought within any of the exceptions to the rule.

The authorities cited by the appellants all go to cases wherein a judgment might have been rendered either for or against the estate of the deceased administrator, and where the meritorious cause of action was in the plaintiff, and hence do not support their views.

There is evidence in the case tending to prove every point necessary to support the finding, and it is too substantial for us to say that it is not sufficient.

The judgment is affirmed, at the costs of the appellants.

SIDENER v. GALBRAITH ET AL.

STATUTE OF LIMITATIONS.—*Action to set aside Sheriff's Sale.*—*Fraudulent Conveyance.*—*Limitation of Six Years.*—An action to set aside, as fraudulent, a sheriff's sale of land and a subsequent conveyance of the same by the execution defendant to the purchaser at such sheriff's sale, is barred by the statute of limitations of six years.

SAME.—*Continuation of Action which has Failed.*—An action by a purchaser of land at a sheriff's sale, against a purchaser of the same land at a previous sheriff's sale, to set aside the first sale as fraudulent, having been finally determined against the plaintiff on account of a defect in his title, he subsequently purchased the same land at a third sheriff's sale, and, within five years from the determination, but more than six years from the commencement, of the first action, he commenced a suit against the same defendant and the judgment defendant, to set aside, as fraudulent, such first sheriff's sale and also a conveyance of the same land, made by such judgment defendant to his co-defendant after the commencement but before the determination of the first action.

Held, that the second action was not a continuation of the first action, within the meaning of section 218 of the code, and that an answer of the statute of limitations of six years is sufficient.

63	89
137	80
68	89
143	74

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From the Bartholomew Circuit Court.

S. Stansifer and *F. T. Hord*, for appellant.

R. Hill, for appellees.

PERKINS, J.—On the 19th day of October, 1861, the sheriff sold the land of James Anderson, by virtue of an execution duly issued from the clerk's office of the Bartholomew Circuit Court, in this State, to Joseph D. Sidener.

On the 27th day of September, 1862, the appellees commenced proceedings in attachment against said Anderson, in which they obtained judgment; and, without ascertaining that the record thereof had been signed by the judge, caused the clerk to issue executions thereon, on which the sheriff, on the — day of February, 1863, sold the land, previously sold by him to Sidener, to the appellees, the plaintiffs in the attachment proceedings.

On the title acquired by and through said attachment sale and purchase, on the 27th day of April, 1863, the appellees commenced a suit to quiet said title, by causing to be set aside, as fraudulent, the said sheriff's sale to Sidener. They failed in the suit, one of the grounds of said failure being, that the title on which they rested their right to bring their suit was worthless. It was necessary that the plaintiffs should show some interest in the land of Anderson, to enable them to sue to set aside conveyances of it to Sidener. The interest—the title alleged in this second suit—originated thus:

On the 19th day of November, 1868, seven years after the sale to Sidener was made, the appellees severally obtained confession of judgment by said Anderson, on their attachment claims, on executions upon which, on the 13th day of February, 1869, the sheriff sold the land to appellees, which he had sold, as aforesaid, to appellant Sidener, on the 19th day of October, 1861.

On the 24th day of February, 1862, Anderson executed a deed to Sidener for the land which the latter had purchased

at sheriff's sale on October 19th, 1861, and put him in possession of the same, which possession he still retains.

On the title acquired through the sheriff's sale made on the 13th day of February, 1869, upon execution on the judgments confessed by Anderson in November, 1868, the appellees commenced this suit against Sidener and Anderson, to set aside, as fraudulent, the sheriff's sale to Sidener, made in 1861, and the deed of Anderson to Sidener, made in 1862.

The questions upon which the case turns, under the pleadings, are:

1. Does the statute of limitations of six years apply to this suit?

2. Is this a continuation of the suit commenced in 1863?

A great many other questions are presented in the record of between three and four hundred pages, and are ably discussed by counsel; but, as the conclusion at which we have arrived on the questions above stated is decisive of the case, and finally disposes of it, we need notice no other.

The statute enacts, that "The following actions shall be commenced within six years after the cause of action has accrued, and not afterwards."

Among the actions enumerated are those—

"For relief against frauds." 2 R. S. 1876, p. 121, sec. 210.

This case falls directly within this provision. *Duncan v. Cravens*, 55 Ind. 525.

As to the second question, the answer must be determined by the following section of the statute:

"Sec. 218. If after the commencement of an action, the plaintiff fail therein, from any cause except negligence in the prosecution, or the action abate or be defeated by the death of a party, or judgment be arrested or reversed on appeal, a new action may be brought within five years after

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such determination, and be deemed a continuation of the first, for the purpose herein contemplated."

We shall not undertake, in this opinion, to enumerate the particular instances in which a new action may be brought under this section. We content ourselves with showing that the present is not a continuation of the former action, within its meaning.

We may premise, that the previous action, claimed to have failed in this case, did not abate by the death of a party, nor was the judgment in it arrested or reversed on appeal, but, on the contrary, that judgment was affirmed, on appeal to this court.

We express no opinion on the question of negligence.

The present can not be held to be a continuation of the former suit. The parties are not the same; the title on which the plaintiffs, appellees in this court, base their right of action, is not the same; and the relief sought is not the same. Anderson was not a party to the former suit. In the present he is a defendant. See *Galbraith v. Sidener*, 28 Ind. 142.

The title upon which the appellees based their right of action in the former suit was a deed from the sheriff, upon an attachment sale made in February, 1863; while, in the present suit, the only title they claim is derived from the sheriff's sale made in February, 1869, upon judgments confessed by Anderson in November, 1868.

In the former suit, the appellees sought to set aside only the sheriff's sale to Sidener, made in October, 1861. In the present suit, they seek to set aside, in addition, the deed made by Anderson to Sidener on the 24th day of February, 1862, and hence, in this suit, made Anderson a party defendant.

Without proceeding further, it is plain, from the facts stated, that the present is not "a continuation of the first," that brought in April, 1863. It would sanction an evasion

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of the statute of limitations, to hold that it was. *McKinney v. Springer*, 3 Ind. 59; *Flournoy v. The City of Jeffersonville*, 17 Ind. 169; *Null v. The White Water Valley Canal Co.*, 4 Ind. 431.

The judgment is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

RANGLES ET AL. v. RANGLES ET AL.

HUSBAND AND WIFE.—*Post-Nuptial Agreement.—Statute of Descents.—*

Sections 36 and 40 Construed.—Sections 36 and 40 of the statute of descents, 1 R. S. 1876, p. 414, must be construed together, in so far as they relate to post-nuptial agreements for the benefit of wives.

SAME.—*Agreement must be in Writing.—Assent of Wife.*—A post-nuptial agreement, making a pecuniary provision for the wife in lieu of her rights in the real estate of her husband, must, to be valid, be evidenced by a deed or other written instrument bearing an endorsement, or attached to a written acknowledgment, of her “assent to receive the same, in lieu of all” her “right or claim, * * * in the lands of the husband.”

SAME.—*Partition.—Quieting Title.—Complaint.—Cross Complaint.*—In an action by the heirs, to partition the lands of an intestate among themselves, and to quiet their title thereto as against the widow, the complaint alleged that she had entered into a post-nuptial agreement with the intestate, and had accepted a pecuniary provision made thereby, in lieu of her right in his lands.

Held, it not being averred that such agreement was in writing, that it will be deemed to have been merely verbal, and therefore invalid.

Held, also, that an answer by her, in the nature of a cross petition or complaint, avoiding the alleged agreement, and claiming her third interest as widow, is sufficient.

SAME.—*Evidence.*—Where, in such action, there is no evidence of a valid post-nuptial agreement, the finding on that point must be against the party alleging it.

SUPREME COURT.—*Practice.—Motion to Strike out Surplusage.*—The Supreme Court, on appeal, will not reverse a judgment for mere error in overruling a motion to strike surplusage out of a pleading.

PARTITION.—*Action can not be Dismissed after Finding Announced.—*

63	93
139	37
63	93
145	69
63	93
149	372
63	93
154	11
4154	16

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Practice.—It is too late to dismiss an action for partition, over the objection of the defendant, after the finding of the court has been announced.

SAME.—Report of Commissioners.—Correcting Misdescription.—Amendment.

—*Nunc pro tunc Entry.*—Commissioners to make partition of lands may, in their report, correct any misdescription thereof contained in the pleadings, interlocutory order of partition, or the warrant to the commissioners ; and, in such case, it is not error in the court to direct corresponding amendments to be made; and the fact that the court erroneously styles such direction as an order for a *nunc pro tunc* entry, does not vitiate the order.

SAME.—Supreme Court.—Pleading.—Such an amendment of the pleadings will be deemed by the Supreme Court, on appeal, to have been made below.

SAME.—Objections to Commissioners' Report.—The action of the court in overruling an objection to the report of commissioners making partition, made on the ground of inequality in the partition and based merely upon the affidavits of the parties objecting, will not be disturbed by the Supreme Court, on appeal.

From the Tippecanoe Circuit Court.

G. O. Behm, J. Park and A. O. Behm, for appellants.

F. B. Everett, for appellees.

Howk, C. J.—This was an action by the appellants, as plaintiffs, against the appellees, as defendants, for the partition of certain real estate, in Tippecanoe county, Indiana, particularly described in the appellants' complaint.

It was alleged in said complaint, in substance, that, on the 19th day of March, 1875, at said county, one Peter Randles died intestate, the owner in fee-simple of said real estate at the time of his death ; that the appellants and the appellee Eldon G. Randles were the children and heirs at law of said Peter Randles, deceased, and as such were each the owner, in fee-simple, of an undivided one-twelfth part of said real estate ; that the appellee Mahala Randles was the wife, by a second marriage, and widow of said Peter Randles, deceased, and the said Eldon G. Randles was the only child of said Peter Randles, deceased, by said Mahala Randles ; that, during the year 1874, the said Peter Randles was the owner of said real estate, and of some personal property, all of an aggregate value at that time not exceeding twenty-one thousand dollars ; that, in the year 1874,

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domestic difficulties having arisen between said Peter Randles and his wife, said Mahala Randles, an agreement was entered into, by and between them, for a separation, by the terms of which agreement, in consideration that said Mahala would never claim any interest whatever in said Peter Randles' property, either real or personal, and that she would live separate and apart from him for the remainder of their joint lives, and would in all respects support and maintain herself, the said Peter would, on his part, pay or cause to be paid to her the sum of six thousand four hundred dollars; that, in pursuance of said agreement, the said Peter Randles delivered to said Mahala certain notes, secured by mortgage, amounting to said sum of six thousand four hundred dollars, which said notes and mortgage the said Mahala, on or about the 17th day of November, 1874, accepted, in pursuance of the terms of their said agreement, and in full of all her interest in and to the property, both real and personal, of said Peter Randles, and that from said last named day, and in pursuance of said agreement, the said Peter and said Mahala separated, and lived separate, and were so living at the time of the death of said Peter Randles; and that, during their separation, said Mahala supported herself free of charge upon her said husband or upon his estate; and that, when the said Peter and said Mahala were married, said Mahala had no property, nor did she afterward, during their coverture, acquire any property that came into the possession of said Peter Randles; and that said sum of six thousand four hundred dollars was paid by said Peter to said Mahala, out of his own estate and none other. Wherefore the appellants prayed judgment, that it be decreed, that said Mahala Randles had no interest in said real estate, and that the cloud resting upon the title thereto, by her pretended claim, might be removed, and for partition of said real estate, etc.

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To this complaint, the appellee Mahala Randles separately answered in two paragraphs, in substance, as follows:

1. A general denial, except the allegations of her intermarriage with the decedent, Peter Randles, his seizure in fee-simple of the real estate described in the complaint, during their coverture, the death of said Peter Randles, and that her co-appellee, Eldon G. Randles, was the only living issue of their said marriage; and,

2. That she was intermarried with the decedent, Peter Randles, in 1859; that, in three or four years after their marriage, the decedent, without any fault of said appellee, became dissatisfied with her, and manifested a dislike of her, and gave her many just causes of complaint of his conduct towards her, the particulars of which she did not wish to state further than to protect herself in her just rights as against the claim of the appellants, in this action; that, for the period of — years before the death of her said husband, she, said appellee, was in ill health, a confirmed invalid, unable to work, and for much of the time confined to her bed; that the decedent desired the appellee to leave his house, and often stated so to her, and that, on account of his wrong conduct, it was necessary for her health and peace of mind to leave his house and family; that she had no ready money upon which to maintain herself, although she alleged that she was the owner, in her own right, of a large amount of real estate, in said Tippecanoe county, of the value of twelve thousand dollars; that, to gratify the desire and command of the decedent, Peter Randles, and to obtain ready money with which to suitably provide for herself, the said appellee, on the 17th day of November, 1874, caused to be conveyed to him, the said decedent, her said real estate, by joining in a deed therefor to one James Rice, who immediately reconveyed the same to her said husband, Peter Randles, deceased; that no consideration was paid by or to said James Rice, but that he acted as a mere

trustee, through whom to effect a conveyance of said real estate from said appellee to her said husband, Peter Randles; that the lands so conveyed by said appellee (which were particularly described in said paragraph of answer) were a part of the real estate of which said decedent died seized, and of which partition was sought for in this action, among the heirs of said decedent other than said appellee; that, upon the conveyance of said lands by said appellee, and for the reasons, and under the circumstances, stated in said paragraph of answer, said appellee received from said Peter Randles, deceased, the notes of the value of six thousand dollars, and this is the same amount alleged to have been paid her by said decedent, in the appellants' complaint, and that the decedent assigned and paid her no other notes or money. Wherefore the said appellee said that she was entitled, as widow of said decedent, to the one-third of the real estate of which he died seized, and she prayed that the same might be set apart to her in the proceeding for partition commenced by the appellants in this cause.

To this second paragraph of answer the appellants demurred, upon the ground that it did not state facts sufficient to constitute a defence to their action, which demurrer was overruled by the court, and to this ruling the appellants excepted.

The appellants moved the court, in writing, to strike out a certain part of the second paragraph of the separate answer of the appellee Mahala Randles, which motion was overruled, and to this decision the appellants excepted.

The appellants replied, by a general denial, to the second paragraph of said separate answer of said Mahala Randles.

The issues joined were tried by the court, without a jury, at the November term, 1875, and taken under advisement. At the February term, 1876, the court, being fully advised,

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made its finding for the appellee Mahala Randles, on the issues joined between her and the appellants, that she was the owner, in fee-simple, of the undivided one-third part in value of all the said real estate of which the said Peter Randles died seized, to which finding of the court the appellants excepted; and the court further found, that the appellants and the appellee Eldon G. Randles were each the owner, in fee-simple, of an undivided one-eighteenth part in value of said real estate; that the appellants and the appellees were the owners, in fee-simple and as tenants in common, of said real estate; and that partition of said real estate should be made between the said parties, setting apart to each, in severalty, his or her share thereof, as found by the court. Thereupon the court rendered a judgment of partition, in accordance with its said finding.

Afterward, at the same term, the appellants moved the court, in writing, to modify its said judgment of partition, which motion was overruled, and to this ruling they excepted. Thereupon the court appointed commissioners to make such partition, and report the same to the court, at that term.

Afterward, at the same term, the appellants moved the court to dismiss this action at their costs, to which the appellee Mahala Randles objected; and eight days afterward, at the same term, the appellants filed a written dismissal of their action, to which dismissal the appellee objected for the reason that it came too late, and the court took the matter under advisement.

Afterward, at the April term, 1876, the court, being sufficiently advised, overruled the motion to dismiss the action, to which ruling the appellants excepted. At the same term, the commissioners theretofore appointed made and acknowledged in open court their report of partition, to which report the appellants filed written exceptions.

At the September term, 1876, of the court, the appellee Mahala Randles filed an answer to appellants' exceptions; and at the November term, 1876, the court overruled the appellants' exceptions to the report of partition, to which decision the appellants excepted. Thereupon the court ordered that the description of a part of the real estate in the interlocutory order and the warrant issued thereon be amended *nunc pro tunc*, so as to conform to the description thereof in said commissioners' report, to which order the appellants excepted. The court then approved and confirmed said report of partition, and rendered final judgment thereon.

Thereupon the appellants moved the court in writing to set aside the proceedings in this action and grant them a new trial, which motion was overruled, and they excepted to this decision and appealed to this court.

The appellants have assigned in this court the following decisions of the circuit court, as alleged errors:

1. In overruling their demurrer to the second paragraph of the answer of the appellee Mahala Randles;
2. In overruling their motion to strike out a certain part of said second paragraph of said answer;
3. In overruling their motion to dismiss the cause;
4. In overruling their motion to strike out a certain part of the judgment of partition;
5. In overruling their motion to strike from the files the affidavit of P. C. Vawter;
6. In overruling their objections to the commissioners' report of partition;
7. In overruling their objections, as set out in bill of exceptions No. 5; and,
8. In overruling their motion for a new trial.

We will consider and decide such questions arising under these alleged errors, as the appellants' counsel have presented and discussed in their brief of this cause, in the same order in which they have presented them.

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1. It is claimed by the appellants' counsel, as we understand them, that, in and by the allegations of their complaint, the appellants have shown a valid and legal post-nuptial agreement between the appellee Mahala Randles and her deceased husband, Peter Randles, whereby the said Mahala Randles, in consideration of the pecuniary provision of six thousand four hundred dollars, made for her benefit by her deceased husband, in his lifetime, agreed to receive the same in lieu of all her right or claim in the lands of her said husband. We assume, as the contrary was not alleged nor shown, that the alleged agreement mentioned in the appellants' complaint was an oral agreement. Construing together the provisions of sections 36 and 40 of "An act regulating descents and the apportionment of estates," approved May 14th, 1852, as we think we must, it seems very clear to us that such a post-nuptial agreement for a pecuniary provision must be made and evidenced by a deed or instrument in writing, and that it will not be binding on the wife, unless she at the time has signified in writing, indorsed upon or attached to such deed or written instrument, "her assent to receive the same, in lieu of all right or claim of such wife in the lands of the husband." 1 R. S. 1876, p. 414. In our opinion, therefore, the alleged post-nuptial agreement, between the appellee Mahala Randles and her deceased husband, Peter Randles, as stated in the appellants' complaint, was invalid and void, and constituted no bar to the right or claim of said appellee in the lands of her deceased husband.

The court did not err, we think, in overruling the appellants' demurrer to the second paragraph of the answer of the appellee Mahala Randles. This paragraph, though called an answer, was in the nature of a cross petition or cross complaint, in which the appellee alleged her interest, as widow, in the real estate of her deceased husband, and prayed that such interest might be set off to her. For

that purpose, it stated sufficient facts, and therefore the demurrer was properly overruled.

2. The appellants complain of the action of the court in overruling their motion to strike out the first twenty-seven lines of the second paragraph of said appellee's answer. These twenty-seven lines contain the appellee's version of the alleged post-nuptial agreement. The matter stated in those lines was not very material, but it was as good, perhaps, as the post-nuptial agreement. At most, it was mere surplusage; and as a rule this court will not reverse a judgment for an error committed in overruling a motion to strike out surplusage or immaterial matter. *Mires v. Alley*, 51 Ind. 507, and *House v. McKinney*, 54 Ind. 240.

3. It is earnestly insisted, that the finding of the court in favor of the appellee Mahala Randles was not sustained by the evidence. In other words, it is claimed that the evidence clearly showed that there was a post-nuptial agreement, as alleged in the complaint, between said appellee and her deceased husband, Peter Randles, which barred her right or claim to any interest in his lands. There was not a particle of evidence introduced on the trial tending even remotely to show that any such agreement had ever been made or evidenced by any deed or written instrument executed by or between the said parties. There was no proof whatever, therefore, of any post-nuptial agreement which was a valid and legal bar to the appellee's right and claim to her interest, as widow, in the lands of her deceased husband. The finding of the court was clearly right, we think, on the evidence.

4. The appellants claim that the court erred in overruling their motion to dismiss the suit. It will be seen, from our statement of this case, as shown by the record, that the appellants' motion to dismiss was made, and their written dismissal was filed, several days after the finding

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of the court on the trial was announced, and after they had failed to obtain a modification of said finding which they had applied for. In section 363 of the practice act, it is provided, that, when a cause is tried by the court, it may be dismissed by the plaintiff "at any time before the finding of the court is announced." 2 R. S. 1876, p. 184. The implication from this provision is so strong, we think, as to amount to a positive declaration, that a plaintiff may not dismiss his action after the finding of the court on the trial has been announced, except with the defendant's consent and with leave of the court. In this case it is very clear, in our opinion, that the appellants' motion to dismiss, and their attempted dismissal of their action, after the finding of the court was announced, came too late and were, therefore, properly overruled. *Livergood v. Rhoades*, 20 Ind. 411; *Walker v. Heller*, 56 Ind. 298.

5. It is urged by the appellants' counsel, with zeal and ability, that the court erred in overruling the objections and exceptions of the appellants to the commissioners' report of partition. The chief objection insisted upon to this report was the apparent variance in the description of some of the real estate, of which partition was sought for, in the commissioners' report, from the description given in the pleadings, in the interlocutory order for partition, and in the warrant issued thereon to the commissioners. In the appellants' complaint, the lands to be divided were described generally as the lands of which Peter Randles was the owner, in fee-simple, at the time of his death. Besides this general description, a particular description was attempted to be given of each of the several parcels of said real estate, for which partition was sought. These descriptions, both general and special, were adopted and followed in the interlocutory order for partition; and, of course, in the warrant issued thereon to the commissioners to make such partition. These commissioners, one

of whom was the county surveyor, in the discharge of their duty, found that some of the parcels of real estate, of which the said Peter Randles was seized in fee-simple at the time of his death, and of which partition was sought in this action, were misdescribed in the pleadings, in the interlocutory order for partition, and in the warrant issued to said commissioners. In their report of partition, the commissioners corrected these misdescriptions, where they occurred, and assigned and set apart lands to the different parties, in severalty, by proper and accurate descriptions. This action of the commissioners is vehemently complained of by the appellants as erroneous; but we confess that we are unable to perceive wherein or how they were or could be prejudiced or injured by this procedure of the commissioners. Accuracy of description is an essential element of good title to realty; and when, in making a partition of lands, it is discovered that a mistake exists in the description of the lands, or any part thereof, it seems to us that such mistake ought to be corrected, and, if the same is corrected by the commissioners in their report, we fail to see how any of the parties interested can be thereby injured.

When the court overruled the objections and exceptions of the appellants to the report of the commissioners, it was ordered by the court that the interlocutory judgment of partition, and the warrant issued thereon to the commissioners, should be amended *nunc pro tunc*, so that the descriptions of the real estate therein should conform to the correct description thereof in the report of the commissioners.

There was no error, we think, in this order of the court. The parties interested were all before the court, and surely the court had the power, in its discretion, during the pendency of the action, to correct any mere mistake in description in its prior judgment and warrant. This order

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of amendment was certainly within the discretion of the court, and was properly made; but we think it was improperly termed a *nunc pro tunc* order. The office of a *nunc pro tunc* entry, as we understand it, is to make a record of a prior action now as of the date when the action was had, and of which no record was made at the proper time. But a proper order will not be vitiated by giving it an improper name.

In our opinion, the court had the power, and, perhaps, should have exercised it in this case, to direct the parties to so amend their pleadings, as that the same should contain full, true and correct descriptions of the several tracts of land of which the said Peter Randles was the owner, in fee-simple, at the time of his death, and of which partition is sought for in this action. As the pleadings of the parties might have been thus amended in the court below, they will be taken and deemed by this court to have been thus amended.

6. One of the grounds of objection and exception by the appellants to the report of the commissioners was the alleged inequality of the partition, in this, that the share of the real estate, assigned to the appellee Mahala Randles, was much more than the one-third part in value of the whole real estate of which said Peter Randles was seized at the time of his death. This ground was supported by the affidavit of two of the appellants, who had a direct interest in the partition; while the report is the act of three disinterested persons, not of kin to any of the parties, made under the sanction of their oaths. Under such circumstances, we can not say that the court erred, in overruling this ground of objection, and in sustaining the report.

We have now fully considered and passed upon all the questions presented by the appellants' counsel in their brief of this cause, and our conclusion is, that there is no error in the

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record, for which the judgment of the court below ought to be reversed.

The judgment is therefore affirmed, at the appellants' costs.

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PROMISSORY NOTE.—*Presumption as to Place of Execution.*—Where suit is brought upon a promissory note in a court of this State, it will be presumed, the contrary not appearing, that the note was executed in this State.

SAME.—*Presumption as to Locality of Bank where Note is Payable.*—If such note be payable in a bank, the locality of which is not designated, it will be presumed that such bank is located in this State.

SAME.—*Answer.*—*Accommodation Endorser.*—An answer, in such action, by an endorser in blank, that he was merely an accommodation endorser and not a maker of the note, is insufficient.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellants.

NIBLACK, J.—Sylvanus Carey sued Nathan C. Clark and George Teter jointly, on a promissory note, as follows :

“\$2,400.00. INDIANAPOLIS, IND., Jan. 20th, 1877.

“Twenty days after date, we promise to pay to the order of Sylvanus Carey twenty-four hundred dollars, and ten per cent attorney's fees if suit be instituted on this note, negotiable and payable at Fletcher's bank, value received, without any relief whatever from valuation or appraisement laws, with interest at ten per cent. per annum, from date, which has been paid to maturity. The drawers and endorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note. N. C. CLARK.”

Endorsed: “GEORGE TETER.”

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Clark made default ; Teter demurred separately to the complaint, but his demurrer was overruled.

He then answered separately in two paragraphs :

1. In general denial ;
2. That he was an accommodation endorser merely, and not a maker, of the note.

A demurrer being sustained to the second paragraph of Teter's answer, the cause was submitted to the court for trial. There was a finding in favor of the plaintiff for the amount of the note, with interest, and judgment against both the defendants for the amount thus found to be due upon the note.

In their argument here upon the sufficiency of the complaint, the appellants contend that there is nothing upon the face of the note to show that it was payable at a bank in this State, and that for that reason the note was not governed by the law merchant, within the meaning of sections 6 and 16 of the act concerning promissory notes, approved March 11th, 1861. 1 R. S. 1876, p. 635. That the note not being thus governed by the law merchant, and Teter being, *prima facie*, an endorser only, nothing was shown in the complaint to make Teter jointly liable on the note with his co-defendant, Clark.

As regards the character of the note sued on, the precise question raised here in this action was presented and decided in this court in the case of *The Indianapolis Piano Manufacturing Co. v. Caven*, 53 Ind. 258.

It was held, in effect, in that case, that a note sued on in the courts of this State, not appearing to have been made elsewhere, will be presumed to have been executed in this State; and that, where a note, executed in this State is made payable at a bank named, without designating its locality, it will also be presumed that the bank named is located in this State.

It was hence presumed in that case, as it must be in this,

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that "Fletcher's Bank" was a bank in this State, within the meaning of the statute above referred to.

We are thus led to the conclusion, that the note sued on in the case at bar was governed by the law merchant, and that, consequently, the court did not err in overruling Teter's demurrer to the complaint.

The conclusion we have reached does not, in any manner, conflict with the ruling of this court in the case of *Porter v. Holloway*, 43 Ind. 35, as in that case no particular bank was designated in the note.

Some other questions were reserved upon the ruling upon the demurrer to the second paragraph of Teter's answer, and upon the evidence; but what we have said practically disposes of those questions, also, adversely to the appellants, as they are, in fact, but different presentations of the same question in different forms. *Walker v. Woollen*, 54 Ind. 164; *Burroughs v. Wilson*, 59 Ind. 536.

The judgment is affirmed, at the costs of the appellants.

63	107
126	361
63	107
164	562

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VERBARG.

PLEADING.—Practice.—Demurrer.—A demurrer to the whole of a complaint consisting of several paragraphs should be overruled, if any one of the paragraphs be sufficient.

SUMMONS.—County Commissioners.—In an action against certain persons designated in the complaint as the "Commissioners of * * County," the summons served upon them named each one personally, and styled them "Commissioners of the County of * * ."

Held, that the summons was sufficient.

SAME.—Pleading.—Common Count.—A complaint in the nature of a common count, with a bill of particulars attached thereto, may properly be used in an action on account, against the board of commissioners of a county.

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SAME.—*Letting of Public Work.*—*Contract.*—*Pleading.*—A complaint against a board of commissioners alleged, that, pursuant to a proposition by the board for bids on certain work to be done for the county, the plaintiff had made a bid, which was accepted by the board, conditioned upon his giving bond, which he had done, and averred performance by him and a breach by the board.

Held. on demurrer, that the facts alleged constitute a contract, and that the complaint is sufficient.

SAME.—*Answer.*—*Failure to Advertise.*—*Notice of Letting.*—It is no answer to such action to allege that such letting had been made without advertising.

SAME.—*Fraud.*—*Public Policy.*—It is a sufficient answer to such complaint to allege that the plaintiff, by promises of reward made by him to one who intended making a bid to do the work for a less sum than that bid by the plaintiff, had induced him not to make a bid.

EVIDENCE.—*Proposition for Compromise.*—An unaccepted proposition for a compromise of a legal controversy is not competent evidence for either party.

From the Jennings Circuit Court.

T. C. Batchelor, for appellant.

J. Overmyer, for appellee.

BIDDLE, J.—The appellee filed his complaint in the Jennings Circuit Court, against “Samuel M. Crist, Joseph B. Smith and Edward Marsh, commissioners of Jennings county, Indiana,” and caused a summons to be issued thereon by the clerk, commanding the sheriff, in the name of the State, to summon “Samuel M. Crist, Joseph B. Smith and Edward Marsh, commissioners of the county of Jennings, Indiana, to appear” and answer the complaint.

The summons was returned by the sheriff, “Served by reading to the defendants.”

After the service and return of the summons, the appellee filed a complaint against “The Board of Commissioners of the County of Jennings.”

The board of commissioners then entered a special appearance, and moved to quash the summons as to the board. The court overruled the motion, and required the

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board to answer the complaint, to all of which the board reserved exceptions.

We think this summons is sufficient under section 37, 2. R. S. 1876, p. 49. The addition of the words, "Commissioners of the county of Jennings," to the names of the commissioners, was sufficient to inform them who was sued. See, also, *Hughes v. Osborn*, 42 Ind. 450.

The complaint contains three paragraphs. The first is a common count for work and labor done, and materials furnished; the second is upon a special contract to build a fence; and the third is for stone belonging to the appellee, converted by the appellants.

Demurrer to the complaint, generally, for a defect of parties, and because it does not state facts sufficient to constitute a cause of action. Demurrer overruled; exceptions.

Separate demurrers to the second and third paragraphs of complaint; overruled to the second, and sustained to the third; exceptions.

Answer to the whole complaint, in five paragraphs.

Answer to the second paragraph of complaint, in four paragraphs.

Demurrer, for the want of facts, to the third, fourth and fifth paragraphs of answer to the complaint. Overruled to the fourth and fifth; sustained to the third; exceptions.

Demurrers to the second, third and fourth paragraphs of answer to the second paragraph of complaint, for the want of facts. Sustained to the third and fourth; overruled to the second; exceptions.

• Reply.

Trial by jury; verdict for the appellee.

Motion for a new trial overruled; exceptions; judgment; appeal.

Questions upon the following rulings are presented by assignment of error, and discussed by the parties:

1. Overruling demurrer to the complaint.

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There is no error in this. It is so plain we need not discuss it. If either count was good, the demurrer was properly overruled. The first paragraph is in the form of a common count, with a bill of particulars sufficiently specific.

2. Overruling the demurrer to the second paragraph of complaint.

This paragraph sets up a proposition from the appellant to receive bids for building a certain specified fence, avers that the appellee made a certain bid to build the fence, an acceptance of the bid by the appellant upon the condition that the appellee would give bond for the performance of the work, and that the appellee gave the bond required, which was accepted by the appellant. These facts constitute a contract. Performance and the proper breaches are averred. The paragraph is sufficient.

3. Sustaining the demurrer to the third paragraph of answer to the second paragraph of the complaint.

This third paragraph avers that the contract was let without advertising. If this has any significance at all, it could not be set up by the appellant, to defeat its own contract. The demurrer was properly sustained.

4. Sustaining the demurrer to the fourth paragraph of answer to the second paragraph of complaint.

This paragraph is as follows: That, after the adoption of the said plans, and recording the same with the specifications, as alleged in the complaint, the plaintiff, well knowing that one Henry Hampson was desirous to build said stone fence for three dollars per cubic yard, went to the said Hampson and corruptly proposed to him, that, if he would make no bid therefor, he, Verbarg, would get the contract for building said fence for four dollars and fifty cents per cubic yard, and would then divide the profits with the said Henry Hampson; that, by reason of the said corrupt proposition and promise, the said Hampson made no

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bid or proposition to do said work, although he was skilled in the business and possessed abundant means to do said work. And thereupon the said Verbarg made the proposition set out in his complaint, to do said work for the sum of four dollars and fifty cents per cubic yard, and induced the said board of commissioners, by falsely representing that said sum was the lowest possible price at which said work could be done, to accept his said proposition. An additional averment avers a set-off of two hundred and twenty-five dollars.

This paragraph is a good answer to the special contract to which it is pleaded, and upon which the appellee seeks to recover. It shows that the contract was obtained by fraud, and is against public policy. *Bunts v. Cole*, 7 Blackf. 265; *Plaster v. Burger*, 5 Ind. 232; *Vantrees v. Hyatt*, 5 Ind. 487; *Forelander v. Hicks*, 6 Ind. 448; *Gilbert v. Carter*, 10 Ind. 16; Benjamin Sales, sec. 444; Hilliard Sales, 259; Story Sales, sec. 484.

5. The admission of certain evidence, over the objections of the appellant.

At the trial the appellee offered the following writing in evidence:

“To Henry L. Verbarg: If you will pay into the county treasury the sum of one hundred and twenty-five dollars, and pay the expenses of removing the stone to the depot, you can take the stone you delivered to the county to build a stone fence around the court-house square, and we will relinquish all our claim on said stone.

“Vernon, Ind., Dec. 1873.

“SAMUEL M. CRIST,

“EDWARD MARSH,

“JOSEPH M. SMITH,

“Commissioners of Jennings county, Indiana.”

The appellant objected to the introduction of the above evidence, upon the following grounds

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1. Because said paper is wholly irrelevant and immaterial;
2. Because it is no record that said commissioners are by law required to make or keep;
3. Because said paper contains a proposition from the defendants to the plaintiff for a compromise, which the plaintiff refused to accept.

We think the third objection is well taken. An offer or proposition for a compromise of a legal controversy, not accepted, is not competent evidence for or against either party. This paper contains an offer of compromise which was not accepted; it was therefore improperly admitted, over the objections of the appellant.

There are other questions mooted in the case, but, with this opinion before the court, they will not be likely to arise again.

The judgment is reversed, at the costs of the appellee, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

GOODWINE v. STEPHENS.

FALSE IMPRISONMENT.—Defence.—Pleading.—Affidavit Charging Trespass.—Arrest by Constable, on Warrant.—Posse Comitatus.—In an action for damages for false imprisonment, the defendant answered, alleging that the grievance complained of had been committed by him whilst assisting a constable, on being required so to do by the latter, in arresting the defendant on a warrant issued to such constable, by a justice of the peace having jurisdiction, on an affidavit made by the defendant charging the plaintiff with having, “on or about,” etc., “at,” etc., “committed a malicious trespass, by entering on the premises of” the defendant and “pulling off and taking away” rent corn belonging to the place; which warrant commanded the arrest of the plaintiff “to answer a charge of having, at,” etc., “on or about,” etc., “committed a trespass, as” the defendant “has complained on oath.”

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Held, on demurrer, that, looking to the affidavit and warrant, neither is void, though informal and erroneous, and that the answer is sufficient.

Held, also, that, under the affidavit, a warrant for simple trespass may have been intended to be issued.

Held, also, that, under the warrant, upon the call of the constable, the defendant was justified in assisting to make the arrest.

From the Fountain Circuit Court.

G. McWilliams and *J. Ristine*, for appellant.

W. A. Tipton and *J. McCabe*, for appellee.

PERKINS, J.—Complaint for false imprisonment.

The defendant answered in four paragraphs :—

1. General denial.

“2. That, on the 9th day of February, 1875, the said plaintiff and George Conner, Francis Seals, William Malbie, David Pickerell, Frank Seals, John Records, John Stephens, Squire Stephens, and William Thompson, at the county of Warren and State of Indiana, were engaged in the commission of a trespass upon the property of the defendant; and that, on that day, before George Pence, an acting justice of the peace of said county, said defendant filed an affidavit charging said plaintiff and said other parties, above named, with trespass; and, upon the filing thereof, said justice issued his warrant, in due form of law, under his hand and seal, said justice then and there being competent and having full jurisdiction of said offence, a copy of which said warrant is filed herewith and made a part hereof, marked ‘A,’ and which said warrant was directed to any constable of Warren county, commanding the arrest of said plaintiff and the other parties therein named, and that they be brought before said justice for examination at his office, and delivered said warrant to William F. Evans, an acting constable of said township of Jordan, in said county of Warren, who was duly qualified as such constable; and said Evans received said warrant, and proceeded in the execution thereof, by arresting the plaintiff and the

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other parties therein named; and the said Evans then and there commanded the defendant to assist him in making said arrest; and defendant says, that, in obedience to said requirement of said Evans, and by virtue of said warrant, he aided in the arrest of said plaintiff, and the other parties therein named, using no more force than was necessary to make said arrest and convey said plaintiff and the said other parties before the said justice; and that this is the identical imprisonment mentioned in said complaint and no other; and wherefore he says the plaintiff ought not to recover in this action, and he demands judgment for costs.

“3. That, on the 9th day of February, 1875, and on divers other days before that time, the plaintiff and others were engaged in pulling off and carrying away corn growing on the stalk on the land of this defendant, in Warren county, Indiana, and owned by this defendant, of the value of \$50.00; and that, while in the commission of said offence, William F. Evans, a constable of the township of Jordan, in the county of Warren, proceeded to arrest them therefor, and called upon this defendant to assist him in making said arrest; and defendant says, that, in obedience to the command of said constable, this defendant aided in the arrest of said plaintiff and others with him, and used no more force than was necessary in making said arrest and conveying the said plaintiff and other parties before George Pence, an acting justice of the peace of said county; and defendant says that this is the identical matter complained of in said complaint and no other; and wherefore the defendant demands judgment for costs.

“4. That, on the 9th day of February, 1875, and on divers other days before that time, the plaintiff and others were engaged in pulling off and carrying away corn growing on the stalk on the land of this defendant, and owned by this defendant, of the value of \$50.00; and that the de-

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fendant filed before George Pence, a justice of the peace of Warren county, Indiana, an affidavit on said day, charging the plaintiff with the commission of said offence, a copy of which affidavit is filed herewith, marked 'A,' and made a part hereof; and upon the filing thereof said justice issued a warrant, under his hand and seal, said justice being competent and having full jurisdiction of said offence, a copy of which said warrant is filed herewith, and made a part hereof, marked 'B,' and which said warrant was placed in the hands of William F. Evans, an acting constable of Warren county, Indiana, and said Evans then proceeded to take the plaintiff into custody upon the same, and made his arrest, and then and there commanded this defendant to assist him therein; and defendant says, that, in obedience to the command of said constable, he acted in the arrest of said plaintiff and the other parties named in said warrant, using no more force than was necessary to make said arrest and convey said plaintiff and the other parties before the said justice; and that this is the same identical imprisonment, mentioned in the said complaint, and no other; and wherefore defendant demands judgment for costs."

The following are copies of the affidavit and warrant referred to in the answer:

"James M. Goodwine swears, that, on or about the 5th day, inclusive to the 9th day, of February, 1875, in said county, as affiant verily believes, George Conner, Francis Seals, George Stephens, S. Dukes, Squire Stephens, William Malbie, David Pickerel, Frank Seals and William Stephens, John Record and John Stephens, and William Thompson, have committed a malicious trespass by entering on the premises of said affiant, and persisted in pulling off and taking away the rent corn that belongs to the place, as affiant verily believes.

"JAMES M. GOODWINE."

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“Subscribed and sworn to before me, this 9th day of February, 1875. GEORGE PENCE, J. P.”

“State of Indiana, Warren county, ss.

“To any constable of Warren county:

“You are hereby commanded to arrest George Conner, Frank Seals, George Stephens, S. Dukes, Squire Stephens, William Malbie, Daniel Pritchard, Frank Seals, William Stephens, John Record, John Stephens and William Thompson, and bring them forthwith before me, at my office, in Jordan township, to answer a charge of having, at said county, on or about the fifth day, to the ninth day, of February, 1875, committed a trespass, as James M. Goodwine has complained on oath, and have you then and there this writ.

“Given under my hand and seal, this 9th day of February, 1875. GEORGE PENCE. [SEAL.]”

A demurrer was sustained to the second, third and fourth paragraphs of answer severally, and exceptions entered.

Trial by jury, upon the general denial. Verdict for the plaintiff for four hundred and fifty dollars. Motion for a new trial overruled, and judgment on the verdict.

The reasons assigned for a new trial were:

1. Excessive damages;
2. Verdict contrary to law;
3. Verdict contrary to evidence;
4. Error of the court in instructing the jury, that no circumstances could be shown in mitigation of damages;
5. Error of the court in refusing specified evidence in mitigation.

The errors assigned in this court are:

1. The sustaining of the several demurrers to the several paragraphs of defendant's answer;
2. The overruling of the motion for a new trial.

We may observe that we have no brief from the appel-

lee, informing us of the grounds upon which the rulings below were made.

In determining the sufficiency of the second and fourth paragraphs of answer to severally withstand a demurrer, we look only, in this case, to the warrant and the action under it. *Davis v. Bush*, 4 Blackf. 330; *Caldwell v. Kenworthy*, 31 Ind. 238.

It may properly be observed, however, that the affidavit was not a nullity, nor void.

The second and fourth paragraphs justify as to the constable, on account of his acting under a warrant, and as to the appellant, on account of his acting in obedience to the command of the constable.

That the warrant might be a protection to the constable, it was necessary that it should be a valid, though it might be an informal and erroneous, one. *Cooper v. Adams*, 2 Blackf. 294; *Webster v. Farley*, 6 Blackf. 163.

The warrant in the case at bar commanded the constable to arrest for a trespass, and the arrest was made under the warrant.

We have two sections of a statute providing for the punishment of trespass. Section 13 of the misdemeanor act enacts, that every person who shall maliciously injure any property of another shall be deemed guilty of a malicious trespass, and, on conviction, shall be fined, and may be imprisoned, etc.; and section 14 of the same act provides, that every person who shall, without license, cut down or remove any tree, etc., or other valuable article, shall be deemed guilty of a trespass, and, on conviction, shall be fined, and may be imprisoned.

Under the affidavit in this case, a warrant for simple trespass might well have been intended to be issued. The affidavit would have justified a warrant for such trespass. Perhaps it would have justified one under section 13. See *Cooper v. Adams*, *supra*, and the other authority there cited. See *The State v. Shaw*, 4 Ind. 428.

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The warrant, then, being valid, it authorized the constable to make the arrest; and, as it authorized him to make the arrest, it authorized him to call upon persons to assist him in making it; and it was the duty of the person or persons so called upon to obey the call. 2 R. S. 1876, p. 651, sec. 6; *The State v. Deniston*, 6 Blackf. 277.

And section 45 of the misdemeanor act enacts:

“Every person required by any sheriff or his deputy, or by any coroner, constable, or any conservator of the peace, to assist him in the execution of his office, or in the service of any process, and failing to obey, shall, upon conviction, be fined in any sum not exceeding one hundred dollars, unless he show a valid cause for not obeying.” See 2 Addison Torts, 702.

The like power to command the aid of citizens in making arrests is conferred upon sheriffs and judges. 2 R. S. 1876, pp. 8, 18.

The second and fourth paragraphs were good, and the court erred in sustaining the demurrers to them.

The third paragraph of answer alleges an arrest without warrant.

Among the duties of a constable are these:

“To act as conservator of the peace, and apprehend and take, forthwith, before the nearest justice, all who violate the law in his presence, and then charge them with such violation on oath.” 2 R. S. 1876, p. 649.

The second paragraph alleges an arrest of appellee for an offence at the time of its commission, in the presence of the officer, and would have been good if it had charged that the prisoner was taken before the nearest justice. We do not decide, as it is not necessary to the determination of this cause that we should, that it is not sufficient as it is.

The fact, that the warrant in this prosecution was issued upon the affidavit of the appellant, does not affect the case.

The affidavit is not charged to have been maliciously made. The suit is not for making the affidavit, but for the arrest of the appellee. See *Carey v. Sheets*, 60 Ind. 17.

Had the affidavit been made to procure a writ for arrest in a civil cause, it might be different. But it was simply a charge of a misdemeanor, duly made and left with a proper magistrate, upon which he judicially acted as, in his judgment, the law required him to act.

In Bigelow's *Leading Cases on Torts*, p. 280, in treating of false imprisonment, it is laid down that:

"In criminal cases the party who prefers the charge is not liable unless it is made maliciously * * ; for the law encourages the exposure of crime. But if a person procure the arrest of another in a civil cause, a proceeding for his own benefit, and not for that of the public, and which he himself conducts, he acts at his peril if the process be irregular." But on this point we decide nothing. See 2 Addison *Torts*, p. 718. On page 749 of the same volume, we find the following:

"It has been held, that if a person goes and lays his complaint of the loss of his property before a magistrate, and tells him of its having been taken or appropriated by the plaintiff, the complaining party is not responsible for what the magistrate may think fit to do upon the strength of this information. If, therefore, the magistrate, acting upon the statement or deposition *bona fide* given, treats the matter as a felony, and issues his warrant for the apprehension of the plaintiff on the charge of felony, and in so doing forms an erroneous judgment, and conceives that to be a felony which is not a felony but only matter for a civil action, the complaining person, who has thus set the magistrate in motion and caused the warrant to be issued, is not responsible for the erroneous judgment of the magistrate, and the acts consequent thereon."

Many authorities are cited to the law as thus laid down.

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The judgment is reversed, with costs; cause remanded for further proceedings, in accordance with this opinion.

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63 120
127 186

DECEDENTS' ESTATES.—Priority of Debts.—Judgment.—The rights of priority, and the order of payment, of claims against a deceased debtor's estate, are fixed and determined by section 109 of the act in relation to the settlement of decedents' estates, 2 R. S. 1876, p. 534, and can not be determined otherwise by the judgment of a court.

SAME.—Judgment of Priority of One over Others.—Notice.—A judgment giving priority to the plaintiff's claim, rendered in an action by the administrator personally against such estate, does not bind creditors who have had no notice of such action.

SAME.—Insolvent Estate.—Former Adjudication.—Merger.—Practice.—Trial.—The administrator of the estate of a deceased debtor, being himself a creditor, filed his claim against the estate and procured its allowance by the court, simply as a general claim. He afterward filed a complaint against such estate, asking that the estate be declared insolvent and that his judgment be adjudged a preferred debt, alleging as ground that the claim was secured by a mortgage executed to him, by his decedent, in his lifetime, on personal property which he had since, as administrator, converted into money. Upon the hearing of the cause it was found by the court that the estate was probably insolvent, and decreed that such claim should be paid out of the proceeds of such property, as a preferred debt. Afterward, upon filing what he intended as his final report, exceptions were filed thereto by other creditors, tried by the court and determined in their favor, whereupon the court, over his objections and exceptions, ordered his said complaint for preferment to be re-docketed for trial.

Held, on a verified motion by the plaintiff to strike the cause from the docket, setting out the proceedings had by him and the judgments rendered in his favor, that the judgment of preferment did not bind the other creditors, and that the motion was properly overruled.

Held, also, that, by obtaining the allowance of his claim as a general debt, it was merged in the judgment of allowance, and that his action for preferment could not be maintained.

From the Crawford Circuit Court.

S. K. Wolfe, for appellant.

H. Woodbury and *J. B. Black*, for appellees.

Howk, C. J.—In this action the appellant, as plaintiff,

filed his complaint, duly verified, against the estate of William A. Jenkins, deceased, of which estate the appellant was, at the time, the administrator.

In his complaint the appellant alleged, in substance, that, on the — day of —, 1866, the said William A. Jenkins, then in full life, executed to the appellant a mortgage on the property therein described, to secure the payment of the moneys therein described, amounting to the sum of five thousand five hundred and seventy-six dollars and twenty-four cents, which said mortgage was filed with and made part of said complaint; that said mortgage, and the moneys therein secured, remained due and wholly unpaid, with the interest thereon, except the sum of eighty dollars, mentioned in said mortgage, and the further sum of two hundred and seventy-four dollars and thirty-two cents, paid by the decedent in his lifetime, and except — dollars, which had been allowed as a dividend on the appellant's said mortgage, by order of the court, leaving then due and unpaid the sum of four thousand dollars; and that the whole of said mortgaged personal property had been sold, as the assets of said decedent's estate. Wherefore the appellant demanded that his said claim should be allowed as a preferred claim against said estate; and he asked that the court would appoint a suitable person, as defendant to his said claim, to protect the interests of said estate, etc.

This complaint was filed by the appellant at the October term, 1871, of the Crawford Common Pleas Court, and William H. Peckinpaugh, Esq., was appointed by the court to defend the action for the interests of said estate. Afterward, at the January term, 1872, of said court, the appellant amended his complaint, so as to make it more certain and specific, to which amended complaint the said Peckinpaugh answered by a general denial.

At the May term, 1872, of said court, the cause was tried

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by the court, without a jury, and a finding made for the appellant, that said estate was insolvent, and that the appellant was entitled to a lien upon the proceeds of the personal property mortgaged to him, and sold by him as such administrator, to the amount of three thousand six hundred and fifteen dollars and twenty-eight cents; that the allowance made to the appellant by said court, at its October term, 1866, of three thousand six hundred and fifteen dollars and twenty-eight cents, with interest from that date, was a preferred claim, to be paid as such before payment by him upon general debts; and that upon said claim the appellant had received the amount of twenty per cent., which should be deducted.

Thereupon the said Peckinpaugh moved the court for a new trial, which motion was overruled, and to this ruling he excepted; and the court rendered judgment upon, and in accordance with, its said finding.

More than two years afterward, to wit, at the September term, 1874, of the Crawford Circuit Court, the final report of the administrator of the estate of said William A. Jenkins, deceased, and the objections of the creditors of said estate to the approval of said final report, having been under advisement since the last preceding term of said court, the court, being sufficiently advised, ordered that said report be not received and approved as a final report, and that the complaint of the appellant, praying that his said claim should be allowed and paid to him as a preferred claim, be placed upon the issue docket for trial, and that said W. H. Peckinpaugh, one of the attorneys of said court, be appointed as an adversary party to resist the allowance of said claim as a preferred claim; to which orders of the court the appellant at the time excepted, for the alleged reason that his said complaint was adjudicated at the May term, 1872, of said court, and filed his exceptions and protest, in writing, against the action and orders of the court.

Afterward, the appellant filed an amended claim or complaint against the estate of said William A. Jenkins, deceased, to which the appellee demurred, for the alleged want of sufficient facts therein to entitle the appellant to the relief prayed for, and the cause was continued.

Afterward, at a special term of said court, held on the 3d day of September, 1875, before a special judge, the parties appeared, and the appellant moved the court, in writing, to strike the cause from the docket, which motion was overruled, and to this decision he excepted.

The appellant then filed an amended complaint in two paragraphs, to each of which the appellee demurred for the alleged insufficiency of the facts therein to constitute a cause of action, which demurrers were severally sustained by the court, and to each of these decisions the appellant excepted.

The appellant, failing to amend his said complaint or either paragraph thereof, judgment was rendered on the demurrers, that he take nothing by his said suit, and that the appellee recover his costs in this action expended.

The appellant has assigned, as errors, the following decisions of the circuit court :

1. In overruling his written motion to strike this cause from the docket ;
2. In sustaining the appellee's demurrer to the first paragraph of the appellant's amended complaint; and,
3. In sustaining the appellee's demurrer to the second paragraph of said complaint.

We will consider these errors in the order of their assignment:

1. In his written motion to strike this cause from the docket, the appellant showed the court that the said cause was then erroneously and improperly on the issue docket of said court, in this, that heretofore, on the — day of

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———, 1867, the appellant filed in the court of common pleas of said Crawford county a claim in his own favor (he being the administrator of said estate), against said estate, in the sum of five thousand five hundred and seventy-six dollars and twenty-four cents; and that afterward, at the October term, 1867, of said court, such other and further proceedings were had therein, that the same, to the amount of three thousand six hundred and fifteen dollars and twenty-eight cents, was allowed against said estate; that afterward, on the 24th day of October, 1871, the appellant filed his complaint in said court of common pleas, then in session, asking said court to determine, declare and decree, that his said claim, by virtue of the facts stated in said complaint, was a preferred claim against said estate, a copy of which complaint was filed with and made part of said motion; that then and thereupon said court of common pleas ordered said complaint to be docketed against said estate, and appointed William H. Peckinpaugh, Esq., an attorney of said court, as an adversary party, to represent and defend said estate therein; that then and thereupon said Peckinpaugh accepted said appointment, and, by consent of the parties and the order of the court, said cause was placed upon the issue docket for trial, at the ensuing January term, 1872, of said court of common pleas, to which term said cause was continued; that afterward, at said January term, to wit, on the 24th day of January, 1872, the appellant filed an amended complaint, a copy of which was filed with and made part of said motion; that afterward, at the May term, 1872, of said court of common pleas, the said Peckinpaugh appeared as the representative of said estate, and issues of law and fact were joined on said amended complaint, by the demurrer and then by the answer of said Peckinpaugh filed thereto; that then and thereupon the issues of fact in said cause were submitted to the court, without a jury, for final trial: that

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said court, on said last named day, having fully heard all the allegations and proofs of the parties, and being fully advised, rendered its final finding, judgment and decree therein, in favor of the appellant, that his said claim was a preferred claim, as to the sum of three thousand six hundred and fifteen dollars and twenty-eight cents thereof and interest, and was entitled to be paid accordingly, said estate being declared probably insolvent; all of which would more fully appear by the records of said court in said cause, to which reference was made, and a copy of said final judgment of said court of common pleas, in said cause, was filed with and made part of said motion; that afterward, at the September term, 1874, of said Crawford Circuit Court, over the objections, protest and exceptions of the appellant, a copy of which was filed with and made part of said motion, the said circuit court ordered that said cause be placed upon its issue docket for trial; and the appellant said that the said cause, then on the docket of said court, was the same cause that was finally determined and adjudicated by said court of common pleas, at its May term, 1872, on the 30th day of May, 1872; and, because the said cause had been fully and finally adjudicated as aforesaid, the appellant moved the said circuit court to strike the same from its docket, and to order the costs of this proceeding to be taxed against said estate.

It appears to us that this written motion shows entirely too much of the proceedings of the court, in connection with the appellant's claim, to justify the court in sustaining said motion. From the motion itself, but more fully and clearly from the return of the clerk of said court to a writ of *certiorari*, awarded in this cause, it appears that the appellant's claim or cause of action, against his decedent's estate, as stated and set forth in his verified complaint, filed at the October term, 1871, had been duly filed by said appellant, on the 29th day of May, 1867, in the court of

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common pleas of said Crawford county, as a claim against said decedent's estate; and that such proceedings had been afterward had on said claim, as that at the October term, 1867, of said court, to wit, on the 29th day of October, 1867, the cause was tried by said court of common pleas, and a finding was made, in favor of said appellant and against said estate, for the full amount of his said claim, and judgment was then and there rendered by said court, "that said sum be paid said claimant out of the assets of said estate." When the appellant first presented his said claim against his decedent's estate, to said court of common pleas, in 1867, he did not ask for judgment thereon as a preferred claim; nor did he, in the statement of his cause of action then filed, show any facts which would give his claim any preference over the "general debts" of his decedent; nor did the court then find or adjudge, that his said claim had any such preference. Doubtless, his claim was merged in the judgment rendered thereon by said court of common pleas, on the 29th day of October, 1867, and thereafter no suit or action could be maintained by him on his original claim.

In his written motion to strike this cause from the docket, the appellant showed the court, that the complaint filed by him in said court of common pleas, in October, 1871, stated the same claim or cause of action for which he had obtained a judgment of said court against said estate, in October, 1867; and that the object of his later suit or proceeding was to have said court to determine, declare and decree, that his said claim, by virtue of the facts stated in his verified complaint, was a preferred claim against said estate; that the court had appointed an adversary party to represent and defend said estate, in the suit instituted by him in October, 1871; that issues of law and fact were then joined upon his said complaint, and the issues of fact were tried by the court, and a final finding,

judgment and decree were made and rendered by the court, that his said claim was a preferred debt against said estate, and should be paid accordingly; and that, more than a year after such final trial and judgment, in September, 1874, the court below, over the appellant's objections, protest and exceptions, had ordered his said cause to be placed upon its issue docket for trial.

It seems to us, that the second suit or proceeding, instituted by the appellant, in October, 1871, was wholly unauthorized by law. His claim had passed into a judgment against said estate nearly four years before that time, as a general debt of the decedent. The statute provides, in section 109 of the decedents' estates' act, 2 R. S. 1876, p. 534, the order in which all claims against the estate of a decedent shall be paid; but we know of no statutory provision, which would authorize a trial by the court of the question of priority, as between the creditors, in their absence, and in such a manner as to bind or conclude them. The law prescribes, in plain terms, what claims shall have priority of payment over the general debts of the decedent; and the judgment of the court, that a particular claim shall have preference over the general debts of the decedent, will not give the claim such preference, contrary to the provisions of the statute. In other words; we think that the rights of priority, and the order of payment, of the claims against a decedent's estate, are fixed and determined by the letter of the statute, and not by the judgment of the court. In our opinion, therefore, the judgment of the court, in the suit instituted by the appellant in October, 1871, was not final and conclusive as to the priority of his claim over the general debts of his decedent, in such manner as to preclude the general creditors from impeaching and contesting his right to a preference. The action of the court, in ordering the appellant's second suit to be placed upon its issue docket for trial, may have been,

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perhaps, irregular and informal; but, if so, the suit itself and the judgment of the court of common pleas therein were irregular and unauthorized, and we cannot say that the court erred in re-docketing the cause for a further hearing. As the judgment of the court of common pleas, giving the appellant's claim a preference over the general debts of the decedent, was not final and conclusive as to the question of priority, we are clearly of the opinion, that the circuit court did not err in overruling the appellant's motion to strike his cause from its docket.

The other errors complained of by the appellant, in this court, are the decisions of the circuit court in sustaining demurrers to the first and second paragraphs of his amended complaint. In each of these paragraphs, the appellant sets up and relies upon the judgment of the court of common pleas upon his verified complaint, filed in October, 1871, as a complete and final determination of the priority of his claim against his decedent's estate, over the general debts of the decedent. From what we have already said, it will appear, that, in our opinion, the said suit or proceeding of the appellant, and the judgment of said court therein, were wholly unauthorized by law, and that the judgment in question, obtained as it was in the absence of, and without any notice to, the general creditors of the decedent, could not be regarded as final and conclusive as to the rights of such creditors. We need not set out, in this opinion, even the substance of the appellant's amended complaint, as we are well satisfied, that neither paragraph thereof has stated facts sufficient to entitle him to the relief prayed for therein. His claim to the priority of his debt over the general debts of the decedent was a matter to be settled between him and the general creditors, but not in this form of proceeding. From the amended transcript, returned into this court on *certiorari*, it appears that the general creditors of the decedent have, by written ex-

ceptions to the appellant's final report of his administration, contested his claim to priority of payment; and it would seem from the transcript, that the decision of the court, upon those exceptions, had been adverse to the appellant. What we decide in this case is, that the decision of the court of common pleas of Crawford county, upon the appellant's verified complaint filed in October, 1871, was not final and conclusive as to the priority of his claim, or its right to a preference, over the general debts of the decedent; and that this question of priority or preference could not be heard and finally determined in this suit or proceeding, in the absence of, and without notice to, the decedent's general creditors. The question as to the priority or preference of the appellant's claim, over the general debts of the decedent, is not properly presented in and by the record and the errors assigned thereon, and is not decided.

We find no error in the record of this cause, for which, in our opinion, the judgment of the circuit court ought to be reversed.

The judgment is affirmed, at the appellant's costs.

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149	143
149	552

GUARDIAN AND WARD.—*Sale of Ward's Real Estate.*—*Payment by Canceling Guardian's Debt.*—A guardian, on making sale of his ward's real estate, has no right to receive from the purchaser, as a part of the purchase-money, his own promissory note or other individual obligation, held against him by the purchaser.

SAME.—*Action against Purchaser for Purchase-Money, or to set aside Sale.*—Where a guardian does receive such a payment, and fails to pay over the amount thereof in money, the ward may maintain an action against the purchaser, either for the purchase-money or to set aside such sale.

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SAME.—Such a sale deprives the ward of no rights, so long as the property, or the proceeds thereof, can be traced in the hands of any one having full knowledge of all the equities.

SAME.—*Principal and Agent.*—*Sale by Agent.*—One who acts as the agent of another, in making a sale of real estate belonging to the principal, has no right to receive from the purchaser, as a part of the purchase-money, a discharge of an individual obligation held against him by the purchaser.

SAME.—*Applying Payment.*—*Presumption.*—A purchaser of real estate from one who makes the sale as the guardian of one, and as the agent of another, joint owner, and pays part of the purchase-money by surrendering and satisfying an obligation held by him against such guardian and agent individually, has no right to presume that such payment will be applied on the amount due to such principal and not on the amount due to the ward.

SAME.—*Husband and Wife.*—The fact that such contract of sale was made with the knowledge of the husband of such principal, who was also an infant, and that, by the terms of such contract, such obligation was to be applied as a payment upon the purchase-money due to the principal, does not make such payment valid.

SAME.—*Report of Sale by Guardian.*—The facts, that the residue of the purchase-money was paid in cash, and that the guardian reported the sale of the ward's real estate as made for cash, do not make such sale valid as against the ward.

SAME.—*Ratification of Sale by Ward.*—A recovery by the ward, against the guardian and his sureties, for the amount of such sale, constitutes, *prima facie*, a ratification of the act of the guardian.

From the Bartholomew Circuit Court.

F. T. Hord, for appellants.

R. Hill, for appellees.

NIBLACK, J.—This was an action by Catharine A. Bevis and her husband, Benton J. Bevis, against Kentley R. Heflin and William Stover.

The complaint shows, that, on the 10th day of December, 1867, the said William Stover was appointed guardian of the said Catharine, then Catharine A. Stover; that at the time of the appointment of the said William Stover as such guardian, the said Catharine was the owner in fee-simple of an undivided one-half of one-seventh of a certain quarter section of land in Bartholomew county; that, on the 14th day of September, 1869, the said Wil-

William Stover, as such guardian, filed his petition in the common pleas court of Bartholomew county, and procured an order of said court, authorizing and directing him to sell the said Catharine's interest in said real estate; that, soon thereafter, the said guardian sold her said interest in said real estate to said Heflin, for the sum of nine hundred dollars, which said sale was in due time approved and confirmed by said common pleas court, and by its order a deed of conveyance was executed and delivered by the said guardian, to the said Heflin, for said real estate; that the said Heflin never paid to said guardian the said purchase-money, or any part thereof, but the same remains due and wholly unpaid; that, to cheat and defraud the said Catharine, said Stover, as aforesaid, and said Heflin entered into an agreement, whereby said Stover, as such guardian, was to accept and receive in settlement and payment of said purchase-money certain indebtedness due and owing by Stover personally to said Heflin and said guardian did attempt to settle and discharge said indebtedness thereby, and said Heflin paid no part of said purchase-money, but the same remains wholly unpaid; that said money has been demanded and payment has been refused; that Stover and the sureties given by said Stover on his bond in procuring the sale of said land are insolvent; that the said Catharine has intermarried with Benton J. Bevis, and demands judgment against Heflin for two thousand five hundred dollars, with a lien on said real estate for the payment thereof, or that said sale be cancelled, set aside and held for naught, and that she recover possession, with damages for the detention, of said real estate.

Heflin answered separately in three paragraphs:

1. In general denial.

"2. That the said Catharine and her sister Esther A. were the owners in fee, as tenants in common, of one undivided seventh part of the north-east quarter of section

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fourteen, in township ten north, of range five east, lying in said county of Bartholomew; that said Esther, being still under the age of twenty-one years, had intermarried with one Hayes H. Wynn, a person of full age; that both said Catharine and said Esther were the daughters of said William Stover, his co-defendant; that this defendant, being desirous of purchasing the said one-seventh interest of said Catharine and said Esther, proposed to said Stover, who, in that behalf, was then acting as agent for said Wynn and his said wife, that, if said Stover would secure to this defendant a perfect title to all said one-seventh part of said quarter section, this defendant would pay therefor the sum of eighteen hundred dollars, provided said Stover would arrange to take, as part of the purchase-money therefor, a note held by this defendant against said Stover for \$509.70, with the accrued interest thereon, amounting in all to about \$545.00; that said Stover fully acquainted said Hayes H. Wynn with said defendant's proposition, and thereafter, with the full knowledge and consent of said Wynn, said Stover accepted said proposition, upon condition that an order of the court could be obtained for the sale of said Catherine's interest in said real estate. And defendant says, that thereafter said Stover, upon proper application, did obtain such order of court, and sold the interest of said Esther, as agent for her and her said husband, and the interest of said Catherine, as her guardian, jointly, to said defendant, for said sum of eighteen hundred dollars; and this defendant paid therefor in cash the sum of, to wit, \$1,255.00, and surrendered to said Stover said note amounting to, to wit, \$545; and said Stover, to secure to this defendant the title to the interest of said Hayes H. Wynn and wife in and to the undivided half thereof, and that said Wynn and wife should execute to this defendant a good and sufficient deed of conveyance therefor, when said wife of said Wynn should arrive at the age

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of twenty-one years, executed and delivered to this defendant a mortgage upon certain real estate therein described, for the sum of fifteen hundred dollars, conditioned that said Esther A. Wynn and Hayes H. Wynn should execute and deliver to this defendant a good and sufficient deed of conveyance to said interest of said Esther in the real estate above described, when said Esther should have arrived at the age of twenty-one years. And said Stover, as such guardian, reported to the proper court, that he had sold said interest of said Catherine for \$900 cash in hand ; and thereafter, to wit, on the — day of —, 1870, said Stover, in his account current report, made to the proper court in the business of said guardianship, reported said sum of \$900 as received by him and then in his hands. Defendant further says, that he had no notice or knowledge whatever that said Stover applied, or intended to apply, said amount of said note or any part thereof upon the purchase-money of said Catherine's portion of said real estate ; and he further says, that, at the time of making said contract, and at the final consummation of said trade, pursuant thereto, and for a long time, to wit, three years thereafter, the said Stover was entirely solvent and amply able to pay the amount of said note ; and he further says that said contract was made and carried into effect in the utmost good faith on his part, and without any intention whatever to defraud or wrong said plaintiff.

“3. That, long after the sale of said Catherine's said interest in said real estate, as set forth in said complaint, and with full knowledge of all the facts in relation thereto, said plaintiff caused suit to be brought, in the name of the State of Indiana, in this court, on the bond given by said Stover as guardian of said Catherine, in which said suit said relators, the present plaintiffs, charged said defendant Stover with having received said \$900.00 in cash, and with having failed to account therefor, and issues were formed

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upon said complaint and such proceedings were had, that thereafter, to wit, on the 17th day of February, 1875, judgment of this court was rendered in favor of the State of Indiana, for the use and benefit of said plaintiffs in this action as relators in said action on said bond, for the sum of \$1,235.25 damages, which said sum included said sum of \$900.00, proceeds of said sale of said Catherine's interest in said real estate. Therefore defendant says said plaintiffs ought not to maintain said action."

Stover made no defence.

The plaintiffs demurred separately to the second and third paragraphs of Heflin's answer, but their demurrers were overruled.

They then replied in denial of the second paragraph, and to the third paragraph, that the said Catherine was a minor, under the age of twenty-one years, when suit was brought for her use against her said guardian and his sureties, and when judgment was obtained for her use against them; that, at the time, she had no knowledge of the terms of the sale of her said real estate to the said Heflin or that her said guardian had received his own note from the said Heflin in part payment of her said real estate, and did not obtain such knowledge until long after said judgment was recovered against said Stover and his sureties, and that the said guardian and his sureties were wholly insolvent.

The cause was tried by the court without a jury, and, upon a finding in favor of Heflin, judgment was rendered for the defendants.

It is well settled, that a guardian, upon a sale of his ward's property, can not receive anything but money in payment, that he can not receive his own note in payment for his ward's property, and that, if he shall attempt to do so, and shall afterward fail to account for and pay over in money the proceeds of such sale to his ward, the

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ward may maintain an action against the purchaser for the purchase-money, or to set aside the sale. *Chandler v. Schoonover*, 14 Ind. 324; *Austin v. Willson's Ex'r*, 21 Ind. 252; *Wallace v. Brown*, 41 Ind. 436; *Talbott v. Dennis*, 1 Ind. 471; *Thomasson v. Brown*, 43 Ind. 203; *Sacia v. Berthoud*, 17 Barb. 15; *Fox v. Kerper*, 51 Ind. 148; *Petrie v. Clark*, 11 S. & R. 377.

It is also well settled, that, where a person knowingly receives from a trustee the trust property, in satisfaction of the individual debt of the trustee to him, such person must be regarded as participating in the fraudulent diversion of the trust property, and becomes liable to the beneficiary of the trust. *Wallace v. Brown, supra*. Also, that an abuse of a trust can confer no rights on the party abusing it, nor on those who claim in privity with him, and that such an abuse can deprive the *cestui que trust* of no rights, so long as the property, or its proceeds, can be traced and identified in the hands of those who have full knowledge of all the equities. *Perry Trusts*, sec. 835.

These legal propositions are not controverted by the appellees. It is only contended by them, that the rules of law thus laid down have no practical application to the facts set up in the second paragraph of Heflin's answer. They argue, that, as the payment to Stover by Heflin was a joint payment, that is, was for the use of both Mrs. Wynn and the ward of said Stover, Heflin had a right to expect that Stover would apply his individual note on the purchase-money due Mrs. Wynn, as the law did not permit him to apply it on the amount due his ward, upon the principle that it will be presumed, in the absence of notice to the contrary, that a trustee will do his duty in the management of the business of his trust.

They also cite authorities to show, that ordinarily the purchaser of trust property is not responsible for any misapplication of the purchase-money by the trustee.

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The appellees, in their argument, lose sight of the fact that Stover was only the agent of Mrs. Wynn and her husband, and that, as such agent, he had no right to accept anything but money for his principals. Story Agency, section 98. Heflin was not, therefore, justified in relying upon the alleged presumption that Stover would apply his note on Mrs. Wynn's portion of the purchase-money, in the absence of any agreement that it should be so applied.

The authorities cited by the appellees, in regard to the non-responsibility of purchasers of trust property for the application of the purchase-money, have relation to purchases in which payments are made in money, and not to cases like the one in judgment where the alleged payment consists in a surrender merely of the individual note of the guardian, which can not be legally recognized as a payment at all for property sold by a guardian.

The facts set up in the second paragraph of Heflin's answer show that his offer to purchase was conditional upon Stover's agreeing to take up his note as a part of the purchase money, without any stipulation as to the fund upon which such note was to be applied. True, it is stated that the purchase by Heflin was with the full knowledge and consent of the husband of Mrs. Wynn, but it is not alleged that her said husband agreed that Stover's note should be applied on Mrs. Wynn's portion of the purchase-money. Hence it is not shown that Stover was authorized to receive anything but money for Mrs. Wynn's interest.

We are therefore of the opinion, that the allegations of the second paragraph of the answer did not relieve Heflin of the charge in the complaint as to his having voluntarily contributed to the devastation of the estate of Stover's ward, and that the court erred in overruling the appellant's demurrer to that paragraph.

The third paragraph of Heflin's answer, we think, set up a state of facts which, *prima facie*, amounted to a ratifi-

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cation of the conduct of Stover as guardian, and hence we can not say that the court erred in overruling the demurrer to that paragraph. 2 Greenl. Evidence, sec. 66; *Wallace v. Morgan*, 23 Ind. 399.

But, for the ruling of the court on the second paragraph of the answer, the judgment will have to be reversed.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the second paragraph of Heflin's answer, and for further proceedings.

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TRESPASS.—Answer.—Husband and Wife.—Principal and Agent.—Attachment suit before Justice of the Peace of Foreign State.—Law of Foreign State.—Jurisdiction.—In an action for damages for the unlawful taking and conversion, in this State, of a chattel, the defendant answered, alleging, that, in the absence of the plaintiff, who had absconded, he had taken possession of the chattel in this State, at the request of the plaintiff's wife, and that, while it was in his possession, in another State, the same was attached and sold in an action instituted by the defendant and other attaching creditors, against the plaintiff, before a justice of the peace of such State, a copy of which proceedings was made part of the answer.

Held, on demurrer, that the statute of the foreign State, authorizing suits in attachment, before a justice of the peace, should have been made part of the answer, that the authority of the wife to so deliver such chattel to him should have been averred, and that the answer is insufficient.

From the Union Circuit Court.

J. C. McIntosh and *P. Smith*, for appellant.

J. Yaryan, *J. L. Yaryan* and *J. W. Conaway*, for appellee.

PERKINS, J.—Complaint as follows:

“Mahlon Flint complains of John Baker, and says, that, on the 18th day of January, 1876, at the county of Union

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aforesaid, the defendant without cause, and unlawfully and wrongfully, took and converted to his own use the following property of the plaintiff, and has not returned the same; that is to say, one horse, of the value of one hundred and fifty dollars," to the plaintiff's damage in that amount, for which he prays judgment, etc.

The defendant answered thus:

"He admits that a horse of the plaintiff came into his possession on or about the — day of January, 1876, but denies the wrongful taking of said horse as alleged in the complaint, and says, that, prior to the time said horse came into his possession as aforesaid, said plaintiff had absconded and abandoned his home in said county, and had left said horse in the possession and care of Mrs. Flint, his wife; and defendant says he took possession of said horse with the consent and at the request of said Mrs. Flint; that, while said horse was so in possession of defendant as aforesaid, at the county of Butler and State of Ohio, proceedings in attachment were instituted against the property of said plaintiff, before James Crawford, a justice of the peace in and for the county of Butler and State of Ohio, a court of competent jurisdiction to hear and determine such proceedings under the laws of the State of Ohio, and that such proceedings were had before said justice, that said horse was, under and by virtue of a writ or writs of attachment, taken from the possession of the defendant, to which proceedings the plaintiff appeared; and afterward, in compliance with and pursuant to the judgment of said justice, it [said horse] was sold to pay and discharge the debts of said plaintiff, due to his attaching creditors in said proceedings, copies of which are filed herewith and made part hereof."

Then follow transcripts of the proceedings and judgments in attachment before Justice Crawford, in the suits of *William H. Johnson v. Mahlon Flint*; *The Oxford Lum-*

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ber Company v. Mahlon Flint; and *John Baker v. Mahlon Flint*.

No copy of the statute of Ohio, relating to the jurisdiction of justices of the peace, was made a part of the answer.

The answer was demurred to for want of facts; the demurrer was sustained, and exceptions entered.

The defendant elected to stand upon his demurrer, declined to answer further, and the plaintiff had judgment.

The error assigned is, that the court erred in sustaining the demurrer to the answer.

It does not appear, from the answer, that Mr. Flint gave his wife any authority to transfer the possession of the horse in question to a third person; nor does it appear that the removal of the horse from the State was within the power, over the animal, attempted to be conferred by Mrs. Flint.

As the horse was admitted in the answer to have been the plaintiff's at the time of taking by Baker, and no authority is shown for the removal of the same to Ohio, such removal appears to have been tortious, and is in no manner justified by the answer.

The answer, setting up a sale on the Ohio judgments above mentioned, did not aver, that the judgments were duly given or made, as required by section 83 of the code of practice. Such being the case, it was necessary to the validity of the answer, that it should set out "facts showing the jurisdiction and authority of the justice to render such judgments." *The Toledo, etc., R. W. Co. v. McNulty*, 34 Ind. 531. No such facts were set forth in the answer. A copy of the law of Ohio, authorizing such judgment and sale, would have been an appropriate mode of showing such facts. The proceedings in the attachment suits, in connection with the facts that they were instituted, immediately on the arrival in Ohio with

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the horse, by Baker, being the next day after he got possession in this State, that he was the principal attaching creditor, and said horse the principal property attached, and he, Baker, the principal recipient of the proceeds of its sale, after paying costs, and that no bond on procuring the attachment appears to have been filed, might lead to a pretty strong inference that the possession of the horse was obtained from Mrs. Flint, and the animal removed to Ohio, in bad faith; but we hold the answer clearly bad on its face, in connection with the exhibits made a part thereof. See *The Ohio, etc., R. W. Co. v. Alvey*, 43 Ind. 180.

No valid excuse, no legal justification, for failing to return or account for the horse, is shown.

The judgment is affirmed, with costs.

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PRACTICE.—Pleading Struck Out.—Bill of Exceptions.—Supreme Court.—A pleading struck out on motion must be made part of the record by a bill of exceptions, to present any question as to such ruling, to the Supreme Court on appeal.

SAME.—Assignment of Error.—Motion for New Trial.—Evidence.—Erroneous Judgment.—Questions arising upon the admission or exclusion of evidence, and the alleged rendition of judgment for the wrong party, are grounds for a new trial, but are not proper assignments of error.

SAME.—Refusal to Dismiss Action.—Pleading.—A refusal to dismiss an action on account of the insufficiency of the complaint is not ground for a new trial, but is a proper assignment of error.

SAME.—Motion for New Trial.—Evidence.—A motion for a new trial on the ground of the exclusion of evidence offered must clearly identify such evidence.

From the Hendricks Circuit Court.

C. C. Nave and *C. A. Nave*, for appellant.

N. M. Taylor and *L. A. Barnett*, for appellee.

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NIBLACK, C. J.—This was a suit commenced before a justice of the peace, by Samuel F. Ensey, against Amelia Craig, for the recovery of the possession of certain portions of a building in Danville, in this State, used as a hotel, which it was alleged the plaintiff had leased to the defendant, and the defendant held over after her term had expired.

The defendant answered in four paragraphs, the first in general denial, and the other three setting up special matters in defence.

There was a finding and judgment for the plaintiff, before the justice.

On appeal to the circuit court, the defendant moved to dismiss the action for want of a sufficient complaint, but her motion was overruled. Thereupon, on motion of the plaintiff, the second, third and fourth paragraphs of the defendant's answer were struck out by the court.

Upon a trial, the court found for the plaintiff, and rendered a judgment of restitution in his favor, and for damages for holding over the premises.

Causes for a new trial, which the court refused to grant, were assigned as follows:

1. For irregularity in the proceedings of the court in overruling the motion of the defendant to dismiss the cause, and for excluding certain evidence offered by defendant;

2. That the finding of the court was not sustained by sufficient evidence; and,

3. That the finding of the court was contrary to law.

Errors are assigned here substantially as follows:

1. That the circuit court erred in striking out the second, third and fourth paragraphs of the appellant's answer;

2. That the circuit court erred in overruling the appellant's motion to dismiss the action for want of a sufficient complaint;

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3. That the circuit court erred in finding in favor of the appellee and against the appellant, as there was no sufficient evidence of notice given by the appellee to the appellant to quit the premises sought to be recovered, the notice given in evidence being substantially insufficient and not properly served ;

4. That the circuit court erred in excluding certain evidence offered by the appellant to prove that the appellee had practised a fraud upon her in leasing the hotel to her, and had rented a room in the same building with the hotel to another person, which was used in such a way as to injure her business as the keeper of such hotel ;

5. That the circuit court erred in rendering judgment against the appellant, where, by the laws of the land, such judgment ought to have been in her favor ;

6. That the circuit court erred in overruling the appellant's motion for a new trial.

The second, third and fourth paragraphs of the appellant's answer, referred to in the first assignment of error, and struck out by the circuit court, not having been made a part of the record by a bill of exceptions, are not properly before us, and hence we cannot consider the question of their sufficiency here. *Buskirk Practice*, 142 ; *Shepard v. Birth*, 53 Ind. 105 ; *Ward v. Angevine*, 46 Ind. 415 ; *Oiler v. Bodkey*, 17 Ind. 600.

As to the complaint, to which the second assignment of error relates, no specific objection to it is pointed out to us here, and we see none, upon a careful examination of it.

The third, fourth and fifth errors embrace matters only proper to be considered on a motion for a new trial ; and, as these matters were not assigned as causes for a new trial, in the circuit court, we can not review them in this court. *Branham v. Record*, 42 Ind. 181.

The first clause of the first cause assigned for a new trial, in the circuit court, did not constitute any lawful rea-

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son for a new trial. The alleged "irregularity" did not occur on the trial, but antecedently to and independently of it, constituting a matter of itself proper to be assigned for error here, if relied upon as erroneous.

The latter clause of said first cause for a new trial was too general and indefinite to be available in this court. The excluded evidence was in no manner identified or particularly referred to by it. *White v. Rice*, 48 Ind. 225; *Morrow v. The State*, 48 Ind. 432; *Anderson v. The Greensburgh, etc., Turnpike Co.*, 48 Ind. 467; *Meek v. Keene*, 47 Ind. 77; *Buskirk Practice*, 244, 245, 246.

No question was raised, upon the motion for a new trial, as to the improper admission of any evidence.

The evidence, as admitted by the circuit court, tended strongly to sustain its finding.

We can not therefore say, that the finding was not sustained by sufficient evidence. Nor can we hold that the finding was contrary to law.

We see no error in the proceedings below.

The judgment is affirmed, at the costs of the appellant.

Opinion filed at May term, 1878.

Petition for a rehearing overruled at November term, 1878.

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REVIEW OF JUDGMENT.—*Cross Complaint for Review.*—*Fraudulent Conveyance.*—*Evidence.*—*Husband and Wife.*—*Demurrer.*—*Insufficiency of Complaint a Ground for Review.*—*Coverture.*—*Limitations.*—*Legal Disabilities.*—*Practice.*—*Sheriff's Sale.*—In an action by B., against A., G. and others, to review a judgment in favor of G., against A. and B., rendered in an action by G., against A. and B., to set aside certain alleged fraudulent conveyances made through J., by S., to A. and B., the wife and minor child of S., A. filed a cross complaint against G., alleging, that, in the action sought to be reviewed, G.'s com-

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plaint against A. and B. alleged, that the conveyances attacked had been made by S., to defraud G. in the collection of a debt in his favor against S., existing prior, and merged in a judgment subsequent, to the making of such conveyances, and that S., from and after the rendition of such judgment, had been "wholly insolvent;" that A., on her own behalf and as guardian *ad litem* of B., had filed a cross complaint against G., alleging that, in consideration of money advanced by A. to S., her husband, to pay off a debt owing by him, and in consideration of her joining with him in a conveyance of certain other lands, he had promised to procure the conveyance to her of the land in controversy; that, either by mistake or otherwise, but without her knowledge or consent, he had taken such conveyance in his own name; that thereupon, without any intention on her part to defraud his creditors, and without any knowledge of her husband's indebtedness, and solely to carry out his agreement with her, she and her husband made the conveyance complained of to J., and J., at her request, had made the conveyance complained of to A. and B.; and that, at the time of such conveyances, S. was solvent; that a demurrer to such cross complaint, for insufficiency, had been sustained, to which A. had excepted; that thereupon judgment was rendered, setting aside such conveyances and subjecting the land in controversy to sale on execution to satisfy G.'s judgment against S.; that said land had been sold, and a certificate of purchase issued, to G., by the sheriff; that A. was, at the time of such action by G., and now is, a married woman. Prayer, that the sheriff be enjoined from conveying to G., that the judgment against A. and B. be reviewed, that the demurrer to A.'s said cross complaint be overruled, and that the title to the land be quieted in A. and B. A.'s cross complaint for review set out a transcript of the proceedings and judgment had in the action sought to be reviewed, which transcript, though not certified to by the clerk, was averred to be a full, true and complete copy thereof.

Held, on demurrer, that A.'s cross complaint for review is sufficient.

Held, also, that her cross complaint in the action sought to be reviewed was sufficient.

Held, also, that G.'s demurrer to A.'s cross complaint for review admitted the truth of the allegation that the transcript of the former action was full, true and complete.

Held, also, that, as A.'s cross complaint in the original action was not an answer to G.'s complaint, the demurrer to the former could not have been carried back and sustained to the latter.

Held, also, that the allegations of such cross complaint, seeking affirmative relief, could not have been given in evidence under the general denial, which was also pleaded by A.

Held, also, that the insufficiency of G.'s complaint was good ground for a review of the judgment, though no demurrer thereto was filed.

Held, also, that such complaint was insufficient.

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Held, also, that the failure of A. to file her cross complaint for review, within three years after the rendition of the judgment sought to be reviewed, is avoided by the averment of her coverture as a legal disability.

SAME.—Legal Disabilities.—When Pleaded.—Demurrer.—Where a complaint shows upon its face that the action is barred by the statute of limitations, and also shows that the plaintiff is under no legal disability, it is insufficient on demurrer; but, where it does not affirmatively show that the plaintiff is under legal disability, such fact must be made to appear by answer.

From the Tipton Circuit Court.

J. E. Heller and D. V. Burns, for appellant.

J. Green, D. Waugh, J. W. Robinson, A. Q. Jones and W. S. Ryan, for appellees.

BIDDLE, J.—In 1875, Joshua K. Harlen, Jr., Rosa B. Harlen and John C. Harlen, by David N. Fisk, their next friend, brought this complaint to review a judgment rendered in 1870 against them and the appellant, at the suit of the appellees, declaring a deed purporting to convey certain lands to the plaintiffs, the defendants therein, and the appellant, to be fraudulent and void as against creditors, and decreeing the sale of said lands to satisfy certain claims in favor of the appellees against Joshua K. Harlen, Sr., the vendor in the deed.

To the present complaint for review, the appellant is made a party defendant. She appeared, and, admitting the facts as stated in the complaint, filed a cross complaint against the appellees, which substantially contains the following averments:

That, on the 21st day of April, 1870, certain of the appellees filed their complaint against the appellant, Joshua K. Harlen, Sr., and Josiah M. Clark, and the other appellees herein, averring, that, on the 21st day of October, 1868, Joshua K. Harlen, Sr., was the owner of certain described lands; that, on said day, the said Joshua K. Harlen, Sr., and the appellant, then his wife, conveyed the said lands to Josiah M. Clark, without any consideration,

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and that said Clark, on the 24th day of October, 1868, conveyed the same to the said Joshua K. Harlen, Jr., Rosa B. Harlen and John C. Harlen and the appellant; that, prior to said conveyances, the said Joshua K. Harlen, Sr., was indebted to certain of the defendants herein, in large sums of money, for which they have since recovered judgments, sued out executions thereon, and exhausted the property of Joshua K. Harlen, Sr., which failed to satisfy said judgments, and that said conveyances were fraudulent, etc.; that, on the 6th day of May, 1870, she, for herself and as guardian *ad litem* of the minor defendants, the said Joshua K. Harlen, Jr., Rosa B. Harlen and John C. Harlen, filed their separate answers to said complaint in two paragraphs, the first being a general denial, and the second a cross complaint, showing that the appellant had paid full value for the property conveyed to her and said children, without knowledge of the existence of the indebtedness of the said Joshua K. Harlen, Sr., to the plaintiffs; that said conveyance was accepted by them without any fraudulent intent, and asked that the title to said lands be quieted in them; that to this cross complaint the plaintiffs filed their demurrer, for the reason that the same did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court, and exceptions reserved to the ruling; that such proceedings were had in said cause, that a verdict was returned at the May term, 1870, but no entry of judgment or decree was made or signed by the court during said May term, 1870; that, at a time subsequent to said term, a *nunc pro tunc* entry of the finding and judgment in favor of said plaintiffs and against the appellant and others, and an order of sale of said premises, were made in said cause solely by J. V. Cox, clerk, as of the 16th day of May, 1870, "and said suit being determined went off the docket, and has never since been reinstated."

That, on the 19th day of December, 1870, said plaintiffs

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in the original suit filed in said court, against this appellant and others, a complaint entitled, "A motion for rendition of judgment." This plaintiff avers that she had no notice whatever of the pendency of said proceedings; yet such proceedings were had thereon, as that, at the May term, 1871, of said court, a decree was rendered therein setting aside the appellant's title to said lands, and declaring that the said conveyance was fraudulent and void as against the creditors of Joshua K. Harlen, Sr., and decreeing a sale of said lands to pay the judgments aforesaid; that the sheriff of the county, on the 14th day of November, 1874, sold said lands as lands are sold on execution, and that the same were bought by Aquilla Jones, one of the defendants hereto, who now holds the certificate of purchase from said sheriff; that the appellant, during all said time was, and still is, under legal disability, being a married woman, the wife of her co-defendant, Joshua K. Harlen, Sr.; that a full and complete transcript of the record in said cause is filed herewith and made a part hereof; that the court erred in sustaining the demurrer to said cross complaint in said cause, and erred in rendering judgment that said conveyance was fraudulent and void, and in subjecting said premises to sale to pay the debts of Joshua K. Harlen, Sr., and erred in rendering judgment without having acquired jurisdiction over the person of the appellant, and erred in appointing the guardian *ad litem* of the minor defendants in said suit, who is and was at the time a married woman, being the wife of Joshua K. Harlen, Sr.

Prayer, that the judgment be reviewed and set aside; that the demurrer to the cross bill therein be overruled; that the title to said lands be quieted in the vendees of said deed, and that the sheriff be enjoined from executing a deed to the purchaser at said sheriff's sale, etc.

A demurrer to this cross complaint, alleging the insuffi-

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ciency of the facts therein stated to constitute a cause of action, was sustained, and exceptions reserved. The appellant stood by her demurrer, and the court rendered judgment against her. This ruling presents the only question in the case for our consideration.

To the complaint in the judgment and proceeding sought to be reviewed, the appellant answered by a general denial, and also filed the following cross complaint:

“Second. And, for an answer and cross complaint herein, she says, that, before the execution of the deed mentioned in said complaint to her and her said children, to wit, on the 10th day of January, 1860, her husband, to whom she has been married and for whom she has toiled more than thirty years last past, was the owner of two hundred acres of land in Clinton county, in said State, of the value of \$10,000, free from incumbrances except as herein mentioned, as well as of a large amount of personal property. His personal property was more than sufficient to pay all his debts existing at that time. The portion of said lands occupied as a homestead by her and her said husband, consisting of forty acres, was incumbered by a mortgage to the school fund of said county of Clinton for the sum of \$500. And this defendant avers, that, in consideration of the sum of \$500, then advanced by her to her said husband, at his request, out of her own separate funds, to pay off said mortgage, he, her said husband, then agreed and promised to convey said homestead, which was then of the value of three thousand dollars, to her, by way of settlement for her separate use, but he neglected to make such conveyance. Afterwards, and but a short time before the purchase of the lands mentioned in the complaint and an adjoining forty-acre tract, her said husband, being desirous of disposing of said lands in said county of Clinton, and re-investing the proceeds thereof in lands and other property in said county of Tipton, in consideration that this defendant

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would join with him in the conveyance of said land, and thus extinguish her contingent interest therein, he, her said husband, being at the time unembarrassed by debts, and being worth at least \$12,000 over and above all liabilities against him, and in consideration of his undertakings aforesaid and the money she had advanced him as aforesaid, then promised and agreed to and with this defendant to purchase for her, in her own right, an eighty-acre tract of land near the Indianapolis, Peru and Chicago railroad, in said county of Tipton, and erect good and suitable buildings thereon, for a home for herself and family; and this defendant avers, that, relying on said promises and undertakings of her said husband last aforesaid, she did join with her said husband in the conveyance of said Clinton county land.

“Afterwards, to wit, on the 21st day of October, 1863, in pursuance of said last mentioned undertakings and agreements on the part of her said husband, he did purchase the lands mentioned in the complaint, and said adjoining forty-acre tract, for her, but, by mistake or from some cause unknown to her, took the title to the same in his own name, without her knowledge or consent; and the improvements made on said lands by her husband since said purchase have all been made by him in pursuance of her said contract with him before mentioned.

“Immediately after said purchase, her said husband put her in possession of said lands, which she has continued to hold ever since, and during the time she has been so in possession she has made valuable and lasting improvements thereon, to at least the value of \$1,000.

“Shortly before the execution of the conveyance to her and said children, mentioned in the complaint herein, her husband became embarrassed in his circumstances, and proposed to mortgage said two forty-acre tracts of land to Messrs. Landers, Conduitt & Co., to secure the sum of be-

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tween \$800 and \$900, but she refused to join in said mortgage, or any other mortgage or conveyances of property to which she held the legal title, but finally consented to join with him in mortgaging the said forty-acre tract adjoining the said lands mentioned in said complaint, on condition that he would, without further delay, convey or cause to be conveyed to her and her said children the lands mentioned in said complaint, which of right had belonged to her ever since he had purchased the same; and this defendant avers, that, in consequence of her joining with him in the execution of said last named mortgage, and in consideration of his said agreement, entered into to induce her to pay him said \$500, and to join with him in conveying her said contingent interest in said Clinton county lands as aforesaid, said lands mentioned in the complaint were conveyed to said Clark simply as trustee, in order that he might convey the same to her and her said children;—all in discharge of said undertakings and agreements of her said husband and made as herein stated, without any intention to defraud the creditors of the said husband; and she shows to the court that the provisions made for her by her said husband, in pursuance of his said agreement, are reasonable, and that she chose to have the deed made to her and her said children in the place of having the title made to her in her own right,

“She asks that the lands mentioned in said complaint be quieted in her and her children.”

The defendants to this cross complaint demurred to it upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and exceptions reserved.

This ruling is claimed to be erroneous, and is the ground upon which the judgment is sought to be reviewed.

It seems to us that the facts alleged in this cross com-

plaint constitute a good cause of action in favor of the appellant. They show that she acquired a meritorious right to claim the land, upon a good consideration, before the debts, to the payment of which the land is sought to be subjected, had any existence, and at a time when the debtor was unembarrassed. We believe it falls fairly within the ruling in the case of *Tracy v. Kelley*, 52 Ind. 535, and the numerous cases therein cited. The demurrer to the cross complaint should have been overruled. This error of law, appearing in the proceedings and judgment, forms a ground upon which they may be reviewed. 2 R. S. 1876, p. 249, sec. 588.

It is claimed, on behalf of the appellant, that the original complaint in the judgment sought to be reviewed is defective in not averring the insolvency of Joshua K. Harlen, Sr., at the time his deed, which is alleged to be fraudulent, was made; but there is no averment in the cross complaint of the appellant, presenting this question; we therefore can not consider it. As the cross complaint was not an answer to the original complaint, the demurrer to the cross complaint would not reach back to the original complaint.

The appellees insist that the appellant has not brought before the court a complete record of the proceedings and judgment which are sought to be reviewed. A transcript of the proceedings and judgment is set forth with the cross complaint, and it is averred that it is a full, true and complete record. The demurrer admits the truth of this averment, and we think it is sufficient. It is true, the record is not authenticated by the clerk's certificate and seal, but that is not necessary when the demurrer admits it to be the record.

The appellees also contend, that, as the general denial had been pleaded by the appellant to the complaint, and that as all the facts averred in the cross complaint could

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have been given in evidence at the trial under the general denial, the error in sustaining the demurrer to the cross complaint is harmless. We think the appellees are mistaken in supposing that all the facts alleged in the cross complaint could be given in evidence under the general denial. These facts, as we have held, show a good cause of action against her co-defendants, and, for the purpose of sustaining this cause of action, the facts could not be given in evidence, against her co-defendants, under a general denial to the complaint. Besides, the facts authorize affirmative relief to the appellant, for which she prays, and which could not be given under her general denial to the complaint.

The appellees further claim that the cross complaint shows upon its face, that it was not filed within three years next after the rendition of the judgment which it seeks to review. To avoid this, the appellant avers that she was under the legal disability of coverture at the time, and brought her suit within three years after the disability was removed.

But we do not think that a demurrer, for the insufficiency of the facts averred, could properly be sustained to the cross complaint in this case upon the ground that it shows upon its face, that it was not filed within three years next after the rendition of the judgment.

There are other legal disabilities besides coverture, as being within twenty-one years of age, of unsound mind, imprisoned, or out of the United States. 2 R. S. 1876, p. 313, sec. 797.

And, when a complaint shows upon its face, that the cause of action which it avers has been barred by time, and also shows upon its face, that the plaintiff was under no legal disability to sue during the time, the defect in the complaint may be reached by a demurrer, alleging the insufficiency of the facts to constitute a cause of action; but,

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when the complaint shows upon its face that the cause of action has been barred by time, and alleges nothing as to the legal disability of the plaintiff, or does not show by proper averments, that he was under no legal disability to sue, the defect can not be reached by demurrer, but must be pleaded as an answer, and then the plaintiff may reply the disability, if any exists. *Potter v. Smith*, 36 Ind. 231.

In short, a complaint in such case, to be subject to a demurrer, must show that the action is not brought in time, and that the plaintiff was not under any legal disability; otherwise the legal disability must be set up by a reply to an answer of the statute of limitations.

The demurrer to the cross complaint in this case therefore, although it showed on its face that the action had not been brought within three years next after the rendition of the judgment sought to be reviewed, but did not show that the plaintiff was under no legal disability to sue during the time, could not properly be sustained, upon the ground that the action was not commenced within the time required by the statute.

We have thus disposed of all the questions in the case.

The judgment is reversed, at the costs of the appellees, and the cause remanded with instructions to overrule the demurrer to the cross complaint filed by the appellant.

ON PETITION FOR A REHEARING.

BIDDLE, J.—The appellant petitions us to pronounce an opinion upon the sufficiency of the complaint in the proceedings sought to be reviewed.

No demurrer was filed to this complaint, and, as the demurrer filed to the cross complaint would not reach the original complaint, it appeared at first view, that no question was reserved against the complaint in the original proceedings; but, as the sufficiency of that complaint could be questioned in this court

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by an assignment of error, we think its insufficiency, although it was not demurred to, might be a ground to review the proceedings. We therefore think it better, as future proceedings in the court below are to be had, to decide the question.

The deeds attacked, as being fraudulent against the creditors of Joshua K. Harlen, are alleged to have been made on the 21st and 24th days of October, 1868. Some of the debts sought to be paid out of the lands so conveyed are alleged to have existed before the deeds were made; and it is averred that certain judgments had been recovered since that date, upon debts due before the deeds were made. On some of the judgments a return of "no goods" had been made. It is necessary in a complaint of this character, that it contain an averment that the debtor had no other property subject to execution at the time the deeds alleged to be fraudulent were made, or some equivalent averment, as that he was insolvent at that time. In the complaint we are considering the averment is, "that the said Joshua K. Harlen, Sr., is wholly insolvent, now is and has been from the rendition of all of said judgments, and up to this time, except the land before mentioned." As these judgments were recovered after the deeds were made, we do not think this averment sufficient. *Sherman v. Hogland*, 54 Ind. 578; *Eagan v. Downing*, 55 Ind. 65; *Bentley v. Dunkle*, 57 Ind. 374.

We must hold the original complaint insufficient.

This ruling does not affect the decision heretofore rendered, but will be considered a part of the original opinion.

The appellees have filed a petition for a rehearing; but as they make no point that was not fully considered in the original opinion, and as we are still satisfied with the views therein expressed, the petition is overruled.

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63	155
131	372
63	155
156	647
63	155
171	393

CITY TREASURER.—Action on Bond.—Pleading.—Copy.—In an action on the bond of the treasurer of a city, the bond itself is the foundation of the action, and may properly be made part of the complaint by copy.

SAME.—Copy of Ordinance.—Copies of ordinances of the common council of a city, attached to the complaint in an action on the bond of the treasurer of such city for a failure to account for moneys of the city received by him according to such ordinances, form no part of the complaint, and can not aid its averments.

SAME.—Presumption.—Where, in an action by or against a city, the contrary does not appear, it is presumed that such city was incorporated under the general law of this State for the incorporation of cities.

SAME.—Water-Works Bonds.—Statute Construed.—Clause 26 of section 58 of the act authorizing the incorporation of cities, 1 R. S. 1876, p. 267, gives to the common councils of cities incorporated under such act no authority to issue, negotiate and sell bonds of such cities for the purpose of obtaining money to construct water-works.

SAME.—Legalizing Act.—Power of Common Council.—By the act of January 20th, 1871, Acts 1871, p. 8, bonds of a city, theretofore issued, negotiated and sold by the common council to construct water-works, were legalized and made valid; and it authorized the further issue and sale of all such bonds necessary to complete the same.

SAME.—Sale of Bonds.—Duties of Common Council and City Treasurer.—It is the duty of the common council, under such act, and not of the city treasurer, to negotiate and sell such bonds; but he is liable on his bond for moneys received by him from the sale of such bonds, no matter by whom such sale is made.

SAME.—Principal and Agent.—The duty of the common council to issue, negotiate and sell such bonds is one which they can not, either by ordinance, resolution or otherwise, delegate to or confer upon the city treasurer or any other officer or person.

SAME.—Where a sale of such bonds is negotiated by a city treasurer under an ordinance, resolution or other appointment designating him by name for that purpose, his acts are simply those of an agent of the common council.

SAME.—Liability of City Treasurer.—The city treasurer is not liable on his bond for the mere sale, assignment and delivery by him of such bonds, pursuant to such agency.

SAME.—Answer.—Contract of Sale of Bonds.—An answer in an action on the city treasurer's bond for moneys alleged to have been received by him, as such, from the sale of such bonds, alleged, that, by the terms of such negotiation, which was approved by the common council, the pro-

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ceeds of such bonds were to and did remain in the hands of the purchaser, to be used only as needed in constructing the water-works, and that the purchaser had become insolvent while the funds in question yet remained in his hands.

Held, on demurrer, that the answer is sufficient.

SAME.—Minutes of Common Council.—Parol Evidence.—The minutes of the proceedings of a common council are only evidence of such proceedings, and, where no such minutes have been made, such proceedings may be proved by parol evidence.

SAME.—Pleading.—Copy.—Copies of such minutes attached to a complaint form no part thereof.

SAME.—Reply.—A reply in such action, averring that there was no record of the acts of the common council alleged in such answer, is insufficient.

SAME.—Estoppel.—Report of City Treasurer.—The fact that the city treasurer, in reporting to the common council the condition of the fund realized from such sale, had therein charged himself with funds which, under the contract made between the common council and the purchaser of the bonds, yet remained in the hands of the purchaser, does not estop him to deny his liability for such funds.

SAME.—Cases Doubted or Explained.—The doctrine as to the conclusive character of official reports of certain officers, as laid down in *The State v. Grammer*, 29 Ind. 530, *Wilmer v. The State*, 44 Ind. 223, and *The State v. Prather*, 44 Ind. 287, is not applicable to the reports of the officers of cities incorporated under the general law of this State.

From the Bartholomew Circuit Court.

F. T. Hord and *N. T. Carr*, for appellant.

R. Hill, *S. Stansifer*, *W. W. Herod* and *F. Winter*, for appellees.

Howk, C. J.—This was an action in the court below, by the relator of the appellant, as plaintiff, against the appellees, as defendants, on the official bond of the appellee Zachariah H. Hauser, as city treasurer of the city of Columbus.

The appellant's complaint, as found in the record, consists of two paragraphs, the first and the fourth.

To these two paragraphs of complaint the appellees Barrett, Jones and Hiner answered in three paragraphs, and the appellees Hauser, Barrett, Jones and Hiner, also answered in three other paragraphs.

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The relator of the appellant moved the court below, in writing, to strike out certain parts of each of these answers, which motions were sustained in part, to which decisions the appellees excepted, and were overruled in part, and to these decisions the appellant's relator excepted.

The relator of the appellant then moved the court below, in writing, for orders requiring the appellees "to separate, paragraph, and number the different and several defences," set out in the different paragraphs of said answers. These motions were overruled, and exceptions were saved by appellant's relator to these decisions.

The demurrers of appellant's relator to the several paragraphs of the joint answer of the appellees, for the want of sufficient facts therein to constitute defences to this action, were overruled as to each of said paragraphs, and said relator excepted to these decisions; and said relator's demurrer to the separate answer of the appellees Barrett, Jones and Hiner, for the insufficiency of the facts therein, was sustained by the court below, and said appellees excepted to this decision.

The appellant's relator replied, in two paragraphs, to the appellees' joint answer,—

1. A general denial; and,
2. An affirmative reply.

The appellees demurred to the second reply, for the want of sufficient facts therein to constitute a reply, which demurrer was sustained by the court below to the first and fourth paragraphs of the complaint, and the appellant's relator excepted to this decision; and the appellant's relator, failing and refusing to amend its complaint, a judgment was rendered by the court below for the dismissal of this action, and in favor of the appellees for their costs in this action.

In this court, errors and cross errors, which call in question all the aforementioned decisions of the court below,

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have been assigned by the appellant's relator, and by the appellees. As the several questions presented for our consideration by these errors and cross errors relate chiefly to the sufficiency of the pleadings of the parties, we find it necessary to a proper understanding of those questions, that we should first give a full statement of those pleadings. Accordingly we set out in full the first and fourth paragraphs of the complaint, as follows:

" 1. The State of Indiana, on the relation of The City of Columbus, complains of Zachariah H. Hauser, William McEwen, Archie McEwen, Stinson J. Barrett, Smith Jones and James F. Hiner, and says that the said City of Columbus is a municipal corporation, duly organized under the laws of the State of Indiana providing for the incorporation of cities, and that, on the 4th day of May, 1869, the defendant Zachariah H. Hauser was duly elected to the office of treasurer of the city of Columbus, for the term of two years, and thereupon took and filed his oath of office and official bond, and entered upon the duties thereof; that he continued to discharge said duties until the 2d day of May, 1871, when his said term expired by operation of law; and upon which said day he was duly re-elected to said office of treasurer of the city of Columbus, as his own successor for the term of two years therefrom; that, on the 25th day of May, 1871, he took and filed his oath of office, as said treasurer, and executed his official bond in the penal sum of thirty thousand dollars, conditioned for the faithful performance of the duties of said office, and that he would pay over all moneys received by him according to law and the ordinances of said city, and duly acknowledged the execution of the same before Amos Burns, mayor of said city, with William McEwen, Archie McEwen, Stinson J. Barrett, Smith Jones and James F. Hiner as sureties thereon, each of which of said named sureties, on said day, before the said Amos Burns, mayor as aforesaid, severally acknowledged

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themselves as such sureties, a copy of which such bond is filed herewith, marked 'Exhibit B,' and made a part hereof; that immediately thereupon the said Hauser re-entered upon the duties of said office, and continued the same until the — day of May, 1873, when his term expired by limitation of law, and Alexander H. Kraining was elected his successor, and who duly qualified himself and entered upon the duties of his said office; that, upon the 27th day of September, 1870, the common council of the city of Columbus duly passed, by a two-thirds vote thereof, and adopted, an ordinance entitled 'An ordinance to provide for the construction of water-works,' a copy of which said ordinance is filed herewith and made part hereof, marked 'C,' which said ordinance duly authorized the treasurer of the city of Columbus to negotiate the sale, and to sell, the bonds of said city to the amount of fifty thousand dollars, for the use and benefit of said city; that, on the 7th day of February, 1871, and during the continuance of said defendant Hauser in office, said defendant, as such treasurer aforesaid, did negotiate the sale, and did sell, fifty thousand dollars of said bonds, and did receive therefor, for the use of said city and as such treasurer, the sum of fifty thousand dollars in money; that, on the 26th day of June, 1871, the common council of the city of Columbus passed and adopted an ordinance, entitled 'An ordinance supplemental to an ordinance entitled "An ordinance to provide for the construction of water-works," passed by the common council on the 27th day of September, 1870,' a copy of which said ordinance is filed herewith, and made part hereof, marked 'Exhibit D,' which said ordinance duly authorized the treasurer of said city to negotiate the sale and to sell the bonds of said city to the amount of fifteen thousand dollars, for the use and benefit of said city; that, on the 3d day of July, 1871, the said defendant Hauser, during his said continuance in office as

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such treasurer aforesaid, did negotiate the sale and did sell the bonds of said city, to the amount of fifteen thousand dollars, and did receive therefor, for the use and benefit of said city, and as such treasurer, the sum of fifteen thousand and seventy-five dollars in money; that, on the — day of May, 1873, the defendant Hauser's term of office expired as aforesaid, by limitation of law, and his successor was duly elected and qualified as aforesaid, and yet the said defendant Zachariah H. Hauser, treasurer as aforesaid, has not faithfully and honestly performed the duties of his said office, and has not paid over all moneys received by him as such treasurer, according to law and the ordinances of said city, as required by said bond obligatory, but did commit and make a breach of said official bond, in this: That he has failed and wholly refused to pay over to his successor in office, and to all persons and legally constituted authorities to receive the same, the sum of five thousand dollars of the money so received by him as such treasurer, from the sale of the fifty thousand-dollar bonds authorized by the ordinance marked 'Exhibit C,' and still fails and refuses to pay the same or any part thereof; and that he has failed and wholly refused to pay over to his successor in office, and to all persons and legally constituted authorities to receive the same, the sum of fifteen thousand and seventy-five dollars received by him as such treasurer from the sale of the bonds sold pursuant to the ordinance marked 'Exhibit D,' and still fails and wholly refuses to pay over the same, or any part thereof, to his successor in office, or to any person or duly constituted authority to receive the same, but wrongfully and unlawfully withholds the said sum of twenty thousand and seventy-five dollars, to the damage of said plaintiff thirty thousand dollars. Wherefore plaintiff demands judgment for thirty thousand dollars, and all proper relief."

"4. The plaintiff, for further complaint herein, says,

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that the relator is a municipal corporation, duly organized under the laws of the State of Indiana; that, on or about the 2d day of May, 1871, the defendant Zachariah H. Hauser was duly elected treasurer of the city of Columbus, and on the 25th day of May, 1871, he executed his bond to the said relator, as such treasurer, with William McEwen, Archie McEwen, Stinson J. Barrett, Smith Jones and James F. Hiner, his sureties, who duly acknowledged the execution thereof before Amos Burns, the mayor of said city; a copy of said bond is filed herewith, and made part hereof; that he entered on the duties of his said office; that in said bond it is provided, that, if the said Hauser shall faithfully and honestly perform the duties of said office, and pay over all moneys received by him according to law and the ordinances of said city, then said obligation to be null and void, otherwise to remain in full force; that, on the 27th day of September, 1870, the common council of the said city of Columbus passed an ordinance to provide for the construction of water-works, and thereafter, on the 26th day of June, 1871, the said common council adopted an ordinance supplemental to said ordinance, for the purpose of raising money to complete said water-works; copies of said ordinances are made part hereof; that, by said last ordinance, it was provided, that the bonds of said city be issued, to the amount of \$15,000, in denominations of one thousand dollars each, with coupons for interest thereon annexed, to bear interest at the rate of ten per cent. per annum, payable semi-annually at the banking house of Winslow, Lanier & Co., in the city of New York. The said bonds were to be issued and sold at not less than par. It was further provided, that all money arising from the sale of said bonds should be paid into the city treasury, and that said bonds, when so issued, should be charged to said treasurer, on the books:

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of the clerk, as so much money, and the same should be negotiated and sold by said treasurer.

“Plaintiff charges and avers that said bonds were, on the _____ day of _____, 1871, duly issued and placed in the custody and control of said treasurer, as provided by said ordinance; that the said Hauser, treasurer aforesaid, under and pursuant to said ordinance, and while acting as treasurer as aforesaid, sold all said bonds and assigned and transferred the same to the purchaser, and delivered the same to him. And plaintiff avers, that, on the 2d day of May, 1873, the office of said Hauser, as treasurer, expired, and one Alexander H. Kraining was duly elected as his successor; that the said Hauser did not honestly and faithfully perform the duties of his said office, and pay over, as required by his said bond; that he failed and refused to account to his said successor in office for the said bonds, or any part thereof; that he failed and refused to account for and pay over to his said successor the value or proceeds of said bonds, or any portion thereof, although duly requested; that he did not, during his said term of office, pay out on warrants, properly drawn upon him, any of the proceeds of said bonds, or any money on account thereof; that \$15,000, on account of said bonds, is now due the relator, and is wholly unpaid, and plaintiff demands judgment for thirty thousand dollars and all proper relief.”

The bond sued on was in the penal sum of thirty thousand dollars, and was payable to the State of Indiana. It was dated on the 22d day of May, 1871, and was acknowledged by the appellees on the 25th day of the same month. The condition of this bond was as follows:

“The conditions of the above obligation are such, that whereas the aforesaid Zachariah H. Hauser was, on the 2d day of May, 1871, elected treasurer of the city of Columbus for the term of two years, and until his successor is duly elected and qualified: Now, therefore, if the said

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Zachariah H. Hauser shall faithfully and honestly perform the duties of said office, and pay over all moneys received by him according to law and the ordinances of said city, then this obligation shall be null and void; otherwise to remain in full force and virtue in law."

Copies of the ordinances mentioned in the complaint are in the record. These ordinances are correctly described in the complaint, and we need not set them out in this opinion.

Each of the ordinances provided for the issue and sale of certain described bonds of the city of Columbus, the appellant's relator; and each of them also provided, that all money arising from the sale of said bonds should be paid into the city treasury of said city, and disbursed, as other funds, upon the warrant of the mayor and clerk.

The appellees' defense in this action can be best stated, we think, in their own language; and therefore we set out, in full, their joint answer as follows:

"The defendants Hauser, Barrett, Jones and Hiner, for answer to the first paragraph of complaint, say, that, on the 30th day of December, 1870, after the adoption of said ordinance of September 27th, 1870, providing for the issue and sale of water-works bonds, said common council of said city of Columbus superseded the provisions of said ordinance, in so far as they provided for the negotiation and sale of said bonds by the defendant Hauser, by ordering and directing the city attorney of said city, as their agent, to proceed to Indianapolis and ascertain upon what terms said bonds could be sold; in pursuance of which order said attorney did enter into negotiations, as agent of said common council, for sale of the bonds mentioned in said ordinance, and in the course of such negotiations obtained from Woollen, Webb & Co., bankers, of Indianapolis, a proposition to purchase said bonds at par, provided said common council would permit the price thereof to

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remain in their bank, at Indianapolis, and not draw the same out for any other purpose than the construction of said water-works, and no faster than was required for that purpose, in consideration of which they would pay to said city interest on the price of said bonds while they remained in their hands, at the rate of four per cent. per annum; which proposition said attorney, on, to wit, the 2d day of January, 1871, reported to said common council, which said body thereafter, to wit, on the 26th day of January, 1871, by an order duly entered of record in their minutes, accepted said proposition of said Woollen, Webb & Co., and directed the defendant Hauser, then treasurer of said city, as their agent and in no other capacity, to sell the bonds of said city, provided for by said ordinance, to the amount of \$45,000.00, to said Woollen, Webb & Co., upon the terms of their said proposition, or to any other responsible parties upon equally favorable terms. Thereafter, to wit, on the 7th day of February, 1871, said defendant Hauser, in pursuance of said last mentioned order and by no other or different authority, sold and delivered to Messrs. McEwen & Sons, bankers, at Columbus, Indiana, said bonds of said city, to said amount, upon terms and conditions identical, in every respect, with those so as aforesaid offered by said Woollen, Webb & Co., and accepted by said common council, to wit, said McEwen & Sons purchased said bonds at par, upon condition that the price of the bonds should be retained by them in their bank, and only be drawn out by said city for the construction of said water-works, and no faster than required for that purpose, said McEwen & Sons to pay to said city interest on the price of said bonds, while it so remained in their hands, at the rate of four per cent. per annum. Thereafter, to wit, on the 9th day of February, 1871, said defendant Hauser reported orally to said common council, then being in formal session, the fact of such sale and the full terms thereof as

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herein stated, and said common council formally approved the sale; and thereafter, to wit, on the ——— day of March, 1871, said defendant embraced in his report as treasurer for the month of February, 1871, a statement of the fact and terms of such sale, as above stated, and said common council thereafter, on the ——— day of March, 1871, again approved the same.

“The defendant further avers, that, after said common council had adopted the ordinance providing for a second series of water-works bonds, as mentioned in complaint, said common council themselves, on the 1st day of July, 1871, while in formal session, sold the entire amount of bonds, provided for by said ordinance, to said McEwen & Sons, upon terms and conditions the same in every respect as those upon which they had purchased said first series of bonds, as herein set forth, and said bonds then being in the possession of said McEwen & Sons, for safe-keeping for said city, they, said McEwen & Sons, thereupon assumed the ownership and property thereof, and sold the same to third parties; and defendants aver, that the defendant Hauser had no connection with the sale of said second series, in any capacity whatever.

“Defendants aver that said common council continuously recognized and regarded the conditions upon which both said series of bonds had been sold, and did not draw out of the hands of said McEwen & Sons any portion of the proceeds of said bonds for any other than water-works purposes, or any faster than was required for that purpose; that whatever portion was so drawn out by said common council was duly expended by them in the construction of said water-works, and none whatever thereof ever came into the hands of the defendant Hauser, as treasurer of said city, or in any other capacity; that all of the proceeds of said bonds not so expended by said common council, prior to the 29th day of

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August, 1871, and being the sum of, to wit, \$20,000.00, remained on said day in the hands of said McEwen & Sons, a debt from them to said city, and defendants aver, that, on said day, said McEwen & Sons suspended payment and became insolvent, and have at no time paid to said city, or to the defendant Hauser, as treasurer, or in any other capacity, any part of said debt, but still owe the entire amount thereof to said city. And the defendants aver that the water-works bonds and money arising therefrom, mentioned in said first paragraph of complaint, are the same herein mentioned, and not other or different.

“2. The defendants, for further answer to so much of said first paragraph of complaint as relates to said second series of bonds, and for answer to the fourth paragraph of complaint, say, that said bonds came into the hands of the defendant Hauser, for negotiation and sale as agent of the common council of said city of Columbus, and not as treasurer of said city, and were sold by him as such agent to McEwen & Sons, bankers, at Columbus, Indiana, on, to wit, the 1st day of July, 1871, upon the following terms and conditions, to wit: Said McEwen & Sons purchased said bonds at par, upon condition that the proceeds thereof should be allowed by said common council to remain in their bank, and not be drawn out or expended for any other purpose than the construction of said water-works, and no faster than was required for said purposes; said McEwen & Sons, in consideration thereof, agreeing to pay said city interest on said proceeds at the rate of four per cent. per annum. Thereafter, on the same day, the common council of said city, having full knowledge of the terms of such sale, ratified and approved the same, and defendants aver that said common council continuously thereafter recognized and regarded said contract, and did not draw out of the hands of said McEwen & Sons any part of the proceeds of said bonds for any other purposes than the

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construction of said water-works, or any faster than was needed for that purpose; and that all of the proceeds of said bonds not so drawn out and expended by said common council, prior to the 29th day of August, 1871, remained and were on said day in the hands of said McEwen & Sons, and not in the hands of the defendant Hauser, as treasurer, or in any other capacity; and defendants aver, that on said day said McEwen & Sons suspended payment and became insolvent, and that they still owe said city all of the proceeds of said bonds not so, as aforesaid, drawn out and expended by said common council; and defendants aver that said second series of water-works bonds and the money arising therefrom, mentioned in said first and fourth paragraphs of complaint, are the same herein mentioned, and not other or different;

“3. For further answer to fourth paragraph of complaint, said defendants say, that, to wit, on the 1st day of July, 1871, the bonds mentioned in said paragraph of complaint were signed and sealed by the mayor and clerk of said city, and by them deposited with Messrs. McEwen & Sons, bankers, at Columbus, Indiana, for safe-keeping, and that thereafter, but on the same day, the common council of said city, and not the defendant Hauser, sold said bonds to said McEwen & Sons, upon the following terms and conditions, to wit: Said McEwen & Sons purchased said bonds at par, upon conditions that the said common council would permit the proceeds thereof to remain in their hands, and not draw the same out for any other purpose than the construction of the water-works of said city, nor any faster than was required for that purpose, in consideration of which they would pay to said city interest on said proceeds at the rate of four per cent. per annum, and thereupon said McEwen & Sons took possession of said bonds as their own property under said contract.

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“Defendants aver that said common council continuously thereafter recognized and regarded said contract, and did not draw upon said McEwen & Sons for any part of the proceeds of said bonds for any other purpose than the construction of said water-works, or any faster than was required for that purpose; that whatever portion of said money was drawn out of the hands of said McEwen & Sons was drawn out by said common council, and was all expended by them in the construction of said water-works, and none whatever thereof ever came into the hands of the defendant Hauser as treasurer of said city or in any other capacity. That all the proceeds of said bonds not so drawn out and expended by the common council prior to the 29th day of August, 1871, remained on said day in the hands of said McEwen & Sons, a debt from them to said city, and defendants say, that on said day said McEwen & Sons suspended payment and became insolvent, and that they still owe to said city all of the proceeds of said bonds not so drawn out and expended by said common council. Defendants further say, the matters herein stated are the same mentioned in said paragraph of complaint, and not other or different.”

As we have already said, the appellant's relator, after several intervening motions to strike out parts of the foregoing answers, and to separate the same into other paragraphs, and after demurring to said answers, replied thereto, in two paragraphs. The first reply was a general denial, but the second reply set up new and affirmative matter. We set out in full this second reply, because we think it necessary to an intelligible presentation of the questions involved in this cause, and of our views thereon. This second reply is as follows:

“2. The plaintiff, for further reply to the first, second and third paragraphs of defendants' joint answer, says: The ordinance No. 120, filed with the complaint herein,

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and marked 'Exhibit C, is the sole and only order, ordinance, resolution or motion enacted or adopted by the said common council, in relation to the issue of the first series of water-works bonds; and that, in pursuance of said ordinance, and by virtue of no other authority, the defendant Zachariah H. Hauser, as treasurer of the city of Columbus and not otherwise, on the 7th day of February, 1871, sold said series of bonds to McEwen & Sons, and on the 9th day of February, 1871, said Hauser reported to the common council the sale thereof, and the only entry or action made by said common council in regard thereto was only and solely that said Hauser, as treasurer, had received said bonds, forty-five in number, amounting to \$45,075, and that he had sold said bonds to William McEwen at par and the accrued interest, and receiving therefor the sum of \$45,075, a copy of said entry is made a part hereof, marked B,' which said entry charges said Hauser with said money as received by him, and the said council did not then, nor at any other time prior nor subsequent thereto, make any order, resolution, motion or ordinance, instructing or requiring said Hauser to keep or continue the money received for said bonds in the bank of McEwen & Sons, but at all times permitted and allowed said Hauser to have full and complete control of said funds, and if said Hauser did allow or permit said money to remain in said bank, he did it on his own motion; and in regard to so much of said first and second and third paragraphs of joint answer as relates to the second issue of bonds mentioned in complaint, plaintiff says said defendant Hauser, on the 3d day of July, 1871, sold and disposed of the same, as treasurer of said city and not otherwise or differently; under and by virtue of ordinance number 133, filed with complaint and marked 'Exhibit D,' and not otherwise or by any other or subsequent ordinance, resolution or motion of said council, and that, on said 3d day of July, 1871, he reported said sale to said common council,

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whereupon said council made an order or entry in relation thereto, that the sale of said water-works bonds, made by the treasurer to McEwen & Sons at par, was approved, and the clerk was ordered to charge the amount, \$15,000.00, to the treasurer, on his books, a copy of which entry is made a part hereof, and marked 'A,' and no other or different ordinance, order, resolution or motion was made by said council in relation thereto, and no motion, resolution or ordinance was at any time passed or adopted by said council, requiring said treasurer to keep or continue said money in the bank of said McEwen & Sons, or any other banking establishment, and if said Hauser did keep or continue said money in the hands of said McEwen & Sons, he did the same on his own motion.

" And, on the 1st day of June, 1871, the said Hauser, as treasurer of that city, made his report to the common council of the city of Columbus, wherein he made his statement of the condition of the finances of said city, showing the money in his hands as such treasurer, and under his control, showing at said time in his hands as such treasurer, of water-works funds derived from the sale of said first series of bonds, as a balance still left after certain expenditures, the sum of \$10,826.35, a copy of which report is filed herewith and made part hereof, marked 'C,' there having been no other or different funds at that time, raised by the common council for said water-works, than that raised by the sale of said first series of bonds; and on the 1st day of July, 1871, the said Hauser, as treasurer aforesaid, made his other and subsequent written report to the said common council, wherein he shows a balance in his hands and under his control as treasurer, and in the treasury, derived from the sale of said first series of bonds, the sum of \$8,918.15, a copy of which report is filed herewith and made part hereof, marked 'D;' and on the 1st day of August, A. D. 1871, said Hauser, as treasurer aforesaid,

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made his report to the common council, charging himself with the said sum of \$8,918.15, reported in his former report of water-works funds derived from the sale of the first series of bonds, and also charging himself, as such treasurer, with the additional sum of \$15,000.00, as the proceeds of the sale of the second series of water-works bonds, showing the same to be in the city treasury, and in his hands and under his control as treasurer of said city, and on said day, and in said report, shows there to be in his hands as such treasurer, as the proceeds of the sale of both said series of bonds, the sum of \$20,693.53, as a balance belonging to said water-works funds, a copy of which said report is filed herewith and made a part hereof, marked 'E,' all of which show that he charges himself in said reports with said sum of money, on account of said bonds, as received by him as said treasurer, and which said sum of money is the money sued for in this action, and not other or different."

The errors and cross-errors assigned upon the record of this cause fairly present, for our consideration and decision, the following controlling questions:

1. Are the facts stated in the first and fourth paragraphs of the complaint, or either of them, sufficient to constitute causes of action?

2. Are the facts stated in the three paragraphs, or either of them, of the joint answer of all the appellees sufficient to constitute defenses to the appellant's action?

3. Are the facts stated in the second paragraph of the appellant's reply to the appellees' joint answer sufficient to constitute a reply thereto?

These three questions we will consider and decide in their enumerated order, and in so doing we will make our opinion as brief as we can, consistently with a fair and intelligible presentation of the grounds of our decision. In this connection it will not be improper for us to acknowl-

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edge, as we take pleasure in doing, the invaluable assistance we have received, in our examination of this cause, from the able and exhaustive briefs of the learned counsel of the respective parties.

1. We may remark in the outset, as applicable to both paragraphs of the complaint remaining in the record, that the treasurer's bond in suit is the foundation of this action. The copy of this bond, filed with the complaint, is therefore properly in the record. But the copies of certain ordinances of the city of Columbus, which were filed with the complaint as exhibits, were, in no proper sense, the foundation of the action.

These copies of ordinances did not, therefore, become parts of the record, and can not be considered in determining the sufficiency of either of the said paragraphs of the complaint, except in so far as the contents of the said ordinances may be stated and set forth in the body of the paragraph. This is now the settled doctrine in this State. 2 R. S. 1876, p. 73, sec. 78; *Brooks v. Harris*, 41 Ind. 390; *Trueblood v. Hollingsworth*, 48 Ind. 537; and *Wilson v. Vance*, 55 Ind. 584.

In the first paragraph of the appellant's complaint, it is alleged, as a breach of the bond in suit, that, on the 27th day of September, 1870, the appellant's relator duly passed, by a two-thirds vote of its common council, "An ordinance to provide for the construction of water-works," which ordinance duly authorized the treasurer of said city to negotiate and sell the bonds of said city, to the amount of fifty thousand dollars, for the relator's use and benefit; and that, on the 7th day of February, 1871, the appellee Hauser, as treasurer of said city, did negotiate and sell fifty thousand dollars of said bonds, and received therefor, for the use of said city and as its treasurer, fifty thousand dollars in money; and that, on June 26th, 1871, the common council of said city passed an ordinance supplemental to said

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ordinance to provide for the construction of water-works, which supplemental ordinance duly authorized the treasurer of said city to negotiate and sell the bonds of said city, to the amount of fifteen thousand dollars, for the use of said city; that, on the 3d day of July, 1871, the appellee Hauser, as such city treasurer, negotiated and sold said city bonds, to said amount of fifteen thousand dollars, and received therefor, for the use of said city, as such city treasurer, fifteen thousand and seventy-five dollars in money; that afterward, on the — day of May, 1873, when the term of office of the appellee Hauser, as such city treasurer, had expired by limitation, and his successor in said office had been duly elected and qualified, the said appellee Hauser had not faithfully and honestly performed the duties of his said office, and had not paid over to his successor all moneys received by him, as such treasurer, according to law and the ordinances of said city, in this: That he had failed and refused to pay over to his successor in office, or to any one authorized to receive the same, the sum of five thousand dollars of the moneys so received by him, as city treasurer, from the said sale by him of the first issue of said city bonds, and the said sum of fifteen thousand and seventy-five dollars so received by him, as such treasurer, as the entire proceeds of the second issue of said bonds, or any part thereof.

At the time of the adoption of the first ordinance, mentioned in the first paragraph of the appellant's complaint, by the common council of the city of Columbus, to wit, on the 27th day of September, 1870, the only authority for the passage of said ordinance was the *twenty-sixth* clause of section 53 of the general law for the incorporation of cities, approved March 14th, 1867.

It does not appear from the averments of the complaint, that the city of Columbus was incorporated under the general law for the incorporation of cities; but, as the contrary

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does not appear, we assume that it was so incorporated. *Lourey v. The City of Delphi*, 55 Ind. 250.

In this clause 26 of section 53 of such general law, it is provided that the common council of any such city shall have the power to enforce ordinances, "To construct and establish works for furnishing the city with wholesome water, and for the purpose of drainage of such city may go beyond the city limits and condemn lands and materials and exercise full jurisdiction, and all the necessary power therefor, or the common council may authorize any incorporated company or association to construct such works, and in such case the city may become part stockholder in any such company or association." 1 R. S. 1876, p. 291.

It is clear, we think, that this provision did not authorize the common council of the city of Columbus, at the time of the adoption of its first ordinance, to issue, negotiate and sell the bonds of said city, for the purpose of raising money for the construction of the water-works provided for in said ordinance.

A municipal corporation can not, without express legislative authority, issue, negotiate and sell its corporate bonds, for any purpose. *The City of Aurora v. West*, 22 Ind. 88.

After the adoption of said first ordinance, and before the negotiation and sale of any of the city bonds provided for in said ordinance, as alleged in said complaint, to wit, on January 20th, 1871, an act was approved to legalize the bonds of cities issued to aid in the construction of water-works, and the sale and hypothecation of such bonds, etc. Session Acts 1871, p. 8.

The title of this act is more comprehensive than the act itself; while the preamble of the act, by its terms, is limited solely to the city of Laporte. This act contains two sections, as follows:

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“Section 1. Be it enacted by the General Assembly of the State of Indiana, That all ordinances, resolutions and orders heretofore passed by the common council of said city of Laporte, or any city in this State for issuing, selling, pledging or hypothecating the bonds of said city, to aid in the construction of water-works, and each and every one of them are hereby legalized and made valid; and all bonds which have been issued, sold, pledged or hypothecated under or in pursuance of any such ordinances, resolutions or orders of such common council, and each and every one of them are hereby legalized and made valid; and the common council is hereby authorized to issue, and sell all such bonds of said city, as in their judgment, may be necessary to carry out and perform any and all contracts heretofore made in and about the construction of such water-works, and to fully complete said works.”

Section 2 of said act contained an emergency clause, and a proviso which has no bearing on any of the questions in this case.

It can not be questioned, we think, that the provisions of said act legalized and made valid the ordinance theretofore passed by the common council of the city of Columbus for the issue, sale, pledge or hypothecation of the bonds of said city, to aid in the construction of water-works; nor can it be questioned, that the bonds of said city which had been issued, sold, pledged or hypothecated, under and in pursuance of said ordinance, were, by said act, legalized and made valid.

As the object of said act was to enable such cities as had, under mistaken views of their powers, entered into contracts for the construction of water-works before the passage of said act, to fully complete said works, it seems to us that the act should be construed as if it provided, in express terms, that the common council of any such city should be authorized to issue and sell all such bonds of

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said city as, in their judgment, might be necessary to carry out such contracts and to complete such water-works. This was the construction given to the act in question by this court, in the case of *Daily v. The City of Columbus*, 49 Ind. 169, and we think it is the proper construction. It follows, therefore, that both the issues of the bonds of the city of Columbus, set out and described in the first paragraph of the appellant's complaint, were made legal and valid by the provisions of the act above quoted, and that the common council of said city were thereby fully authorized to negotiate and sell all such bonds of said city, as in their judgment might be necessary to carry out the previous contracts for the construction of the water-works, and to complete said works.

It is claimed by the appellees, that it was no part of the official duty of the appellee Hauser, as treasurer of the city of Columbus, to negotiate and sell the water-works bonds of said city; and, in this position, we think that the appellees are clearly right. There are several provisions of the general law for the incorporation of cities, which indicate and define the duties of the treasurers of cities organized and existing under such law. Thus, in section 31 of said act, it is provided, that "The treasurer shall receive all moneys, notes, bonds and orders belonging to the city, and keep an accurate account of the amounts received and paid out by him, and no money shall be paid out of the treasury by him, except upon an order signed by the mayor, or presiding officer of the common council, and countersigned by the clerk." 1 R. S. 1876, p. 281.

Again, in section 32 of the same act, it is provided, that "All moneys due to or collected for such city on any account whatever, shall be paid to the city treasurer," etc. 1 R. S. 1876, *supra*.

In the last clause or sentence of section 33 of the same act, it is further provided, that the city treasurer "shall

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also, at his own peril, keep the moneys of the city safely." 1 R. S. 1876, p. 282.

And in section 45 of said act, it is also provided, that the city treasurer, as well as certain other city officers, shall "execute a bond, with approved security, payable to the State of Indiana, in such penal sum as the common council shall, by resolution or ordinance, order and direct, conditioned for the faithful performance of the duties of his office, and the payment of all moneys received by him according to law and the ordinances of such city." 1 R. S. 1876, p. 285.

It will be readily seen, we think, from a careful examination of the general law in relation to incorporated cities, that the official duties, imposed by statute upon the treasurers of such cities, are confined to the collection, receipt, safe-keeping and proper disbursement of the city revenues, and to matters immediately connected therewith. It seems very clear to us, that it was no part of the official duty of the appellee Hauser, as treasurer of the city of Columbus, to negotiate and sell the water-works bonds of said city; nor could the common council of said city, by any act, resolution or ordinance, impose such duty upon said appellee, as such treasurer, in his official character, and in such manner as to make it his official duty.

In section 53 of the general law for the incorporation of cities, it is provided, in prescribing the powers and duties of the common council, that "They shall have the management and control of the finances of the city, and of all property, real and personal, belonging thereto." 1 R. S. 1876, p. 288. In the act, above quoted, of January 20th, 1871, which legalized and gave validity to the water-works bonds of the city of Columbus, described in the complaint, it was expressly provided, that the common council of the city were thereby authorized to issue and sell all such bonds of said city, as in their judgment might be neces-

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sary to carry out and perform the contracts theretofore made for the construction of the water-works, and to fully complete said works. *Supra.* The power thus expressly conferred upon the common council of the city of Columbus, to issue and sell the water-works bonds of said city, was clearly a power which the common council could not delegate to any third person. *The Evansville, etc., R. R. Co. v. The City of Evansville*, 15 Ind. 395, on p. 418, and authorities there cited. It is true, that the common council might, in such case, appoint an agent to act for them and in their behalf, in the issue and sale of the bonds; but the acts, when done, were not the less the acts of the common council. It would seem, in this case, from the allegations of the complaint, that the common council of the city of Columbus had appointed the treasurer of said city, *eo nomine*, their agent to negotiate and sell the said water-works bonds; and that the appellee Hauser, who was then treasurer of said city, accepted such agency and negotiated and sold the said bonds. But it seems clear to us, that the action of the common council of the city of Columbus, in designating and authorizing the treasurer of said city to negotiate and sell the said water-works bonds, did not charge the appellee Hauser, then treasurer of said city, with any official duty, as such treasurer, in the premises; nor did the action of said appellee, in the negotiation and sale merely of said bonds, charge him officially, as city treasurer, with any responsibility in the premises, but only in his individual character, as the agent of the common council by their appointment.

But, in the first paragraph of the complaint it was alleged, not only that the appellee Hauser, as city treasurer, had negotiated and sold the water-works bonds of said city, but that he, as such treasurer, had received the amount and proceeds of the sale of said bonds, in money; and that, at the expiration of his term of office, he had

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failed and refused to pay over to his successor in office, or to any person lawfully authorized to receive the same, five thousand dollars of the proceeds of the first issue of said bonds, and the entire proceeds of the second issue of said bonds. As we have seen, both the said issues of bonds were authorized by the provisions of the above quoted act of January 20th, 1871. The bonds were all legal and valid, and the common council of the city of Columbus were fully authorized by law to issue, negotiate and sell as many of such bonds as, in their judgment, might be necessary to secure the completion of the city's water-works. If the bonds were issued and sold for money, by the authority of the common council, it was immaterial, as it seems to us, by whom they were thus sold. If the money, derived from the sale of such bonds, was received by the appellee Hauser, the then treasurer of said city of Columbus, as alleged in the first paragraph of the complaint, it was immaterial, as it seems to us, from whom said appellee received such money. He received it officially, and could not receive it otherwise than as the treasurer of said city, and he and his sureties became responsible therefor, on his official bond.

In our opinion, therefore, the facts stated in the first paragraph of the appellant's complaint were sufficient to constitute a cause of action against all the appellees.

The fourth paragraph of the appellant's complaint differs very materially, in its allegations, from the first paragraph thereof. In this fourth paragraph the appellant's relator, in alleging a breach of the bond in suit, only charged that the appellee Hauser, treasurer of the city of Columbus, at the expiration of his term of office, had failed and refused to account for and pay over to his successor in office, or to any one authorized to receive the same, the value or proceeds of the second issue of fifteen thousand dollars of said city bonds, or any portion thereof. It was alleged

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in said fourth paragraph, that "Said bonds were, on the — day of —, 1871, duly issued and placed in the custody and control of said treasurer, as provided by said ordinance; that the said Hauser, treasurer aforesaid, under and pursuant to said ordinance, and while acting as treasurer as aforesaid, sold all said bonds, and assigned and transferred the same to the purchaser, and delivered the same to him." These are all the allegations, in the fourth paragraph of the complaint, in relation to the sale of the city bonds. They do not show any act done by the appellee Hauser, which he could have done officially, as treasurer of the city of Columbus. The common council of said city were alone authorized by law to issue and sell said bonds. If the appellee Hauser sold said bonds, and assigned and delivered the same to the purchaser, as alleged in said paragraph, it is clear, we think, that he made such sale and delivery solely as the agent of the common council, and that he did not do so either as the treasurer of said city or in any other capacity than as such agent. For what he may have thus done, as the agent of the common council, it is certain that he could not be held liable officially, as treasurer of said city, and that neither he nor his sureties could be held responsible therefor on his official bond. There was no averment in this fourth paragraph of the complaint, that any money was ever received by the appellee Hauser, as treasurer of said city, from the sale of said city bonds, or of any of them.

We are clearly of the opinion, that the fourth paragraph of the appellant's complaint did not state facts sufficient to constitute a cause of action against the appellees or either of them.

2. What we have said, in discussing the sufficiency of the appellant's complaint, leads us almost inevitably to the conclusion that the facts stated in the different paragraphs of the appellees' joint answer were sufficient to constitute

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Good and complete defences to the appellant's action. We have seen, that, under the provisions of the statute which legalized and made valid the water-works bonds of the city of Columbus, the common council of said city were alone authorized to issue and sell said bonds. We have seen, that, under the law, it was not the official duty of the appellee Hauser, as the treasurer of said city, to issue and sell the said city bonds, and that the common council could not charge him, as such treasurer, with the discharge of any such duty. We have seen, that the common council could not delegate the authority, conferred on them alone by the statute to sell the said water-works bonds, to the appellee Hauser, as such city treasurer. We have seen that, whatever the appellee Hauser did or could do in the negotiation and sale of the said bonds, he did and could do only as the agent of the common council, and not by virtue of his office as treasurer of said city. In the light of these conclusions, it is clear to our minds that the appellees' joint answers stated facts which, if true, and the demurrers thereto admitted their truth, constituted full and complete defenses to the appellant's complaint. We have set out these answers elsewhere, in this opinion, and we need not here repeat them. The gist of the appellees' defence, as stated in their joint answers, was, that the appellee Hauser, as the agent of the common council of the city of Columbus, sold the said water-works bonds to Messrs. McEwen & Sons, bankers at said city, at par, upon condition that the proceeds thereof should be allowed by said common council to remain in their bank, and not be drawn out nor expended for any other purpose than the construction of said water-works, and no faster than was required for said purpose, said McEwen & Sons, in consideration thereof, agreeing to pay said city interest on said proceeds, at the rate of four per cent. per annum; that the common council, with a full knowledge of the terms of such sales, ratified

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and approved the same, and thereafter continuously recognized and regarded the terms and conditions of said sales, and did not draw from said bankers any of the proceeds of said bonds, for any other than water-works purposes, or any faster than was required for such purposes; that whatever was so drawn out by said common council was expended by them in the construction of said water-works, and none whatever of the proceeds of said bonds ever came into the possession of the appellee Hauser, as treasurer of said city, or in any other capacity; that all the proceeds of said bonds, not so expended by the common council before the 29th day of August, 1871, to wit, the sum of twenty thousand dollars, remained on said day in the hands of said McEwen & Sons, a debt from them to said city; and that, on said day, said McEwen & Sons suspended payment and became insolvent, and had at no time paid said city or the appellee Hauser, as treasurer of said city, or in any other capacity, any part of said debt, but they still owed the entire amount thereof to said city.

If the above recited facts are true, it is very clear, we think, that the appellant's relator has no claim or demand, either legal or equitable, against the appellees or either of them, by reason of the matters alleged in the complaint.

The paragraphs of answer were not objectionable by reason of the fact that copies of the proceedings and actions of the common council, therein referred to, were not filed therewith as exhibits. The minutes of the common council are only evidence of their proceedings and actions; but if no minutes or record of the acts of the common council have been kept, these facts may be proved by parol evidence, like any other facts. The old doctrine, that the acts of a corporation could be proved only by the record of its proceedings, has ceased to be the law; and the rule is now, that the authorized acts of a corporation are not

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void, merely because there is no written evidence of them, and in such case their existence may be shown by parol evidence. *Ross v. The City of Madison*, 1 Ind. 281; *The School Town of Princeton v. Gebhart*, 61 Ind. 187, decided at the last term.

The court committed no error, we think, in overruling the appellant's demurrers to the several paragraphs of the appellees' joint answer.

3. The only remaining question, necessary to be considered in this case, relates to the sufficiency of the second paragraph of the appellant's reply to the joint answers of the appellees. To this paragraph, the appellees demurred upon the ground that it did not state facts sufficient to constitute a reply. In deciding this demurrer, the court did not pass upon the sufficiency of the second reply, but carried the demurrer back and sustained it as to both the first and fourth paragraphs of the complaint. This decision of the court, we think, was erroneous; as we hold that the first paragraph of the complaint stated facts sufficient to constitute a cause of action. In our opinion, the appellees' demurrer should have been sustained to the second paragraph of the appellant's reply. The reply does not respond to the appellees' defense, as shown in their joint answers. It neither admits nor denies, that the sale of the bonds were made upon the terms and conditions set forth in the answers. The reply seems to rely upon two different matters, as a sufficient response to the appellees' answers.

The first is, that there is no record evidence of any such actions of the common council, as are stated in the answers; and this, as we have seen, is inconclusive. In the absence of record evidence, the actions may be shown by parol.

The second matter, relied upon in the reply, is the report of the appellee Hauser, to the common council, of

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the sales of the bonds to McEwen & Sons, and certain reports or statements made by said appellee Hauser, as treasurer, at different times, to the common council, of the condition of the fund derived from the sales of the said bonds. These reports and statements are thus set up as matter in estoppel. It seems to us that these reports and statements can easily and readily be reconciled with the matters alleged in the appellees' answer, and that, in any view, they are open to explanation, and are not matters of estoppel. Upon the theory, that the matters alleged in the appellees' answers are true, as therein stated, and that the water-works bonds of the city of Columbus had been sold to McEwen & Sons upon the terms stated in the answers, and that the moneys derived from the sales of said bonds had remained by contract in the hands of said bankers, and had not been actually received by the appellee Hauser, as city treasurer, any technical rule or doctrine, which would subject him and his sureties to any liability for such moneys, would receive but little favor or consideration from this court. We are not inclined to extend, and but little inclined to approve of, the rigid doctrine laid down by this court, as to the conclusive character of the official reports of certain officers, in the cases of *The State, ex rel., etc., v. Grammer*, 29 Ind. 530, *Wilmer v. The State, ex rel., etc.*, 44 Ind. 223, *The State, ex rel., etc., v. Prather*, 44 Ind. 287, and perhaps other cases. So far as we know, the doctrine of these cases has never been applied to the official reports and statements of the officers of cities incorporated under the general law of this State. We do not overrule the cases cited, but we simply decide that we will not extend the doctrine of those cases, and make it applicable to the official reports and statements of city officers to the common council of such city.

In our opinion, the facts stated in the second paragraph

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of the appellant's reply were not sufficient to constitute a reply to the appellees' joint answers, and therefore we hold that the demurrer to said paragraph of reply ought to have been sustained by the court.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to sustain the demurrer to the second paragraph of the reply, and for further proceedings in accordance with this opinion.

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HIGHWAY.—*Petition to Ascertain, Describe and Record Highway.*—*Motion to Strike Out.*—*Supreme Court.*—*Practice.*—The judgment of a court, rendered upon a petition for ascertaining, describing and entering of record an unrecorded highway, will not, generally, be reversed by the Supreme Court, for overruling a motion to strike out parts of the petition.

SAME.—*Motion to Dismiss.*—It is not error to overrule a motion to dismiss such a petition, where no ground for the motion is specified.

SAME.—*Electing Between Paragraphs.*—The petitioners in such case can not be compelled to elect upon which of several paragraphs of their petition they will proceed to trial.

SAME.—*Number of Freeholders.*—Such a petition is not required to be signed by twelve freeholders of the county.

SAME.—*Demurrer.*—*Sufficiency of Petition.*—The sufficiency of such a petition may be tested by demurrer or motion.

SAME.—*Notice.*—Such petition should state the names of the owners of lands affected, so that the court may cause proper notice to be given.

SAME.—*Appearance.*—An appearance by a remonstrant cures the want of notice.

SAME.—*Viewers not Required.*—*User.*—*Evidence.*—Viewers are not required in such proceeding; as the fact necessary to be established is, in one class of cases, user for more than twenty years, with the consent of the owners, or, in the other class, that the highway has been laid out but not recorded.

SAME.—*New Trial.*—*Motion to Strike Out and Dismiss.*—*Practice.*—Error in refusing to strike out parts of the petition, or in overruling a motion to dismiss the same, are not causes for a new trial.

SAME.—*Evidence.*—*Instructions.*—*Supreme Court.*—*Assignment of Error.*—Error in admitting or excluding evidence, and in giving or refusing in-

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structions to a jury, are causes for a new trial, and can not properly be assigned as error, in the Supreme Court.

SAME.—*Motion in Arrest.—Record.*—No question upon the ruling on a motion in arrest of judgment can be presented to the Supreme Court, where the record does not contain a motion therefor, assigning reasons.

From the Johnson Circuit Court.

G. M. Overstreet and *A. B. Hunter*, for appellants.

S. P. Oyler, *F. S. Staff* and *L. Short*, for appellees.

PERKINS, J.—Shelby H. Garshwiler and eleven other persons filed a petition in the commissioners' court of Johnson county, asking that a certain highway be particularly described, and the description entered of record.

The petition is in three paragraphs.

The first states that the "highway is a road leading from the Three-Notch line road, to the Mount Pleasant meeting-house and the road leading south from said Mount Pleasant meeting-house; that said described public highway is twenty feet wide, and has been accepted and used by the public, as a public highway, for more than thirty-five years before the filing of this petition."

The second paragraph states "that said public highway leads from the Three-Notch line road, to the said public highway leading south to the Franklin and Martinsville gravel road, and is twenty feet wide, and been "used, etc., "for more than twenty-five years before the filing," etc.

The third paragraph states "that said described highway is a road leading from the Three-Notch line road, to the Mount Pleasant meeting-house and the public highway leading south from said Mount Pleasant meeting-house, and is twenty feet wide, and has been used thirty-five years," etc.

Motions to dismiss were made and overruled.

A remonstrance was filed by Samuel Hemphill and eighteen other persons, against permitting said road to be described and made matter of record, for reasons following:

1. Said highway had never been accepted, used and worked ;

2. Said route never was a public highway ;

3. Said road would not be of public utility ; and,

4. "Because said proposed road will run through enclosed premises of more than one year's standing, and another route can be obtained."

A part of the remonstrance was struck out, on motion.

The court of commissioners heard the case, found for the petitioners, and ordered the road made a matter of record.

The remonstrants appealed to the circuit court.

In that court the third paragraph of the petition was struck out, on motion, but the court refused to strike out the first and second paragraphs, and the remonstrants excepted.

The court overruled a motion to dismiss the entire petition, and the remonstrants excepted.

The cause was tried by a jury ; finding for the petitioners, on the first paragraph of their petition.

Motions for a new trial, and in arrest of judgment, overruled, exceptions, and the court entered the following judgment :

"It is therefore considered, adjudged and decreed by the court, that the road and route situate and being in the county of Johnson and State of Indiana, described in the petition herein as follows :

"Commencing at the south-west corner of section twenty-four (24), township twelve (12) north, range three (3) east, at a point on the Three-Notch line road ; thence due east, on the south line of said section, three hundred and twenty rods, to the township line dividing Franklin and Union townships ; thence north, with and on said township line, eight rods, to the south line of section nineteen, town twelve north, range four east ; thence east, with and

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on said section line, two hundred and ninety-seven rods, to the Mount Pleasant meeting-house, and to the intersection of a road leading south from said meeting-house aforesaid, and of the width of twenty feet along the route aforesaid, ten feet on either and both sides of the line aforesaid ;—is a public highway, and of right should be entered of record as such ; and the board of commissioners of Johnson county, State of Indiana, are hereby ordered to cause the record of said road and highway, as above described, to be made and entered upon the records of said county of Johnson, State of Indiana ; and the clerk of this court is hereby ordered to furnish to said board of commissioners a certified copy of this decree.”

The following are the causes assigned in the motion for a new trial :

1. Error of the court in overruling the motion to dismiss the petition ;
2. Error of the court in overruling the motion to dismiss the first paragraph of the petition ;
3. Error of the court in overruling the motion to dismiss the second paragraph of the petition ;
4. Error of the court in refusing to admit evidence that the petitioners were not all freeholders ;
5. Because the verdict was not sustained by evidence ;
6. Because the verdict was contrary to law ;
7. Because the court erred in giving instructions 1, 2, 3, 4 and 5, and each of them ; and,
8. Because the court erred in refusing to give instruction No. 8.

On the overruling of the motion for a new trial, the remonstrants moved in arrest of judgment, and the motion was overruled.

The assignment of errors is as follows :

1. Overruling the motion to dismiss the petition ;
2. Overruling the motion to dismiss the first paragraph thereof ;

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3. Overruling the motion to dismiss the second paragraph thereof;
4. Overruling the motion to require petitioners to elect, etc.;
5. Overruling the offer to give evidence that the petitioners were not freeholders;
6. Overruling the motion for a new trial;
7. Overruling the motion in arrest of judgment;
8. Error in giving instructions from 1 to 5;
9. Error in refusing to give instruction 8;
10. Because the verdict was not sustained by evidence;
11. Because the verdict was contrary to law.

In practice under the code, in civil cases, a judgment will not, generally, be reversed because the court refused to sustain a motion to strike out parts of a pleading; and certainly no ground was shown for the motion to dismiss the petition. There is nothing in the first three assignments of error. *The Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239.

As to the fourth, we know of no such practice in civil cases, as that of compelling a plaintiff to elect on which of several paragraphs of complaint he will proceed to trial.

In considering the fifth assignment of error, it will be proper, if not necessary, that we should examine and decide whether it was requisite, to constitute a valid petition, that it should be signed by twelve freeholders.

It has already been decided that a different course of procedure may be adopted in applications for the describing and entering of record of highways under sec. 45, 1 R. S. 1876, p. 534, than is required in laying out highways. That section reads as follows:

“All public highways which have been or may hereafter be used as such for twenty years or more, shall be deemed public highways, and the board of county commissioners shall have power to cause such of the roads used as highways

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as shall have been laid out, but not sufficiently described, and such as have been used for twenty years but not recorded, to be ascertained, described and entered of record."

In reference to proceedings under this section, this court, in *The State v. Schultz*, 57 Ind. 19, said :

"We are of opinion, upon an examination of the statute, that no notice or process was necessary in the proceeding before the board. On an application for the location, vacation or change of a highway, notice must be given by publication in a newspaper, or by posting up notices; but we find no law requiring or providing for notice, in cases like that in which the perjury is alleged to have been committed. The law does not provide for notice in such cases, nor the manner of giving the same; and it seems to us that it was contemplated by the Legislature, that the board might exercise the power conferred by the statute set out above, without the publication of such notice as is required on application to locate, vacate or change highways."

In the case from which the above quotation is made, a petition in the cause in which the proceedings were held not void is set out, and is signed by but four persons, and no one of them appears to have been a freeholder. In *Weston v. Lumley*, 33 Ind. 486, so far as appears, the petition may not have been signed by more than two persons, citizens of Monroe county, but whether freeholders or not is not shown. If the statute required twelve petitioners, less than that number would not have given the court jurisdiction, and the proceedings would have been void.

In view of the statute, and the construction it has received, we are prepared to decide, that, in the case before us, as it was impliedly admitted that seven of the petitioners were freeholders, that number was sufficient, if it was necessary that any number should be freeholders. Hence, the court did not err in refusing to hear the evidence offered.

The next assigned error is the overruling of the motion for a new trial. The reasons assigned for it we have stated above. The first three were not causes for a new trial. The fourth we have already considered. We can not say that the fifth and sixth causes were true. We think the verdict was sustained by evidence, and was not contrary to law.

The court did not err in the instructions given, nor in refusing the eighth. There was no error in overruling the motion for a new trial, nor in overruling that in arrest of judgment, there being no motion assigning reasons for such arrest in the record. The remaining errors assigned were but reasons that might have been, and were, assigned in the motion for a new trial.

It may not be improper, before closing this opinion, to state, in the light of previous decisions, some of the steps necessary to be taken to obtain a description and record of a highway, under section 45, *supra*.

In the first place, if the proceeding is inaugurated by a petition, the sufficiency and certainty of it may be tested by a demurrer and motion, as are complaints in other cases. It should state the names of the owners of the property over which the road is claimed to run, so that the court can cause proper notice to be given to them of the pendency of the petition. Such notice is necessary, because, though the statute provides for none, the fundamental principles of law and justice require that those whose rights are to be directly affected by legal proceedings and judgments shall have notice and an opportunity to be heard in opposition to such proceedings. No viewers are to be appointed. The simple facts of whether it was an existing highway by user, in one class of cases, or had been laid out and not recorded, in the other, would be all the issue to be tried, and to be tried as other cases are tried. User, with the consent of the owners, must be shown.

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In the case at bar the parties appeared without notice, which cured the defect of want of notice. See *Stephenson v. Farmer*, 49 Ind. 234.

The judgment is affirmed, with costs.

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CRIMINAL LAW.—Assault and Battery.—Evidence of Two Offences.—Election by the State.—Where, in a prosecution for assault and battery, the State has given evidence, on the trial, of one assault and battery, committed by the defendant upon the person of the prosecuting witness, she thereby elects to claim a conviction for that offence, and can not properly give evidence of another and distinct assault and battery, committed by the defendant upon the person of the prosecuting witness, and elect to abandon the former, and to claim a conviction for the latter, offence.

From the Delaware Circuit Court.

G. H. Koons and *W. March*, for appellant.

T. W. Woollen, Attorney General, and *A. V. Marsh*, Prosecuting Attorney, for the State.

WORDEN, J.—This was a prosecution charging the appellant with having perpetrated an assault and battery upon Elihu Ervin. Conviction.

On the trial, the State gave evidence of an assault and battery committed by the defendant upon the person of Elihu Ervin, and afterward offered evidence of a subsequent, but distinct and separate, assault and battery, perpetrated by the appellant upon the same person. To the latter evidence, the defendant at the proper time objected, on the ground, in substance, that the State, having given evidence of the first assault and battery, had thereby elected to put him upon trial for that offence, and could not then give evidence of a subsequent assault and battery; but the objection was overruled and the evidence admitted.

During the progress of the cause, the court required the prosecuting attorney to elect on which of the offences he would rely, and he elected to rely upon the second. The court thereupon charged the jury, amongst other things, as follows :

“6. Two difficulties between the defendant and the prosecuting witness have been put in evidence, although they transpired near each other, yet so far apart that they constitute different transactions. The prosecutor has elected to rely upon the second transaction for a conviction, and you will have nothing to do with what took place at the first difficulty.”

There was but a single charge of assault and battery ; and the question arises whether, upon such charge, the State may give evidence of several offences, and then select one upon which to rely for a conviction, and abandon the others. We are of opinion that this can not be legally done.

When the State gave evidence of the first assault and battery, she elected to try him for that offence, and she could not afterward abandon the election thus made, and put in evidence of another offence.

The case of the *The State v. Bates*, 10 Conn. 372, is in point. In that case the prosecution was for adultery. The State had given evidence tending to establish one act of adultery, and then gave evidence of several other acts of adultery with the same person. The defendant objected to the evidence not confined to one act of adultery ; but the objection was overruled.

The court said, “ The only question in this case, regards the admissibility of the evidence offered on the part of the State. The information charges but one offence, and that in a single count. Is the State, under such an information, confined to a single offence, in the proof ? Or may the prosecutor, having given evidence of one act of adultery,

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still be permitted to introduce proof of any number of acts, committed, indeed, with the same person, but at different places, and at different times? I do not see upon what principle such a claim can be supported. It is, obviously, opposed to the usual course of proceedings; and would, to say the least of it, be exceedingly inconvenient in practice. The accused comes prepared to defend against a single charge. This he may do successfully—and having done so, may find himself overwhelmed, by a multitude of others, of which the information gave him no notice, and against which he can not be supposed to be prepared. And the prosecuting attorney, instead of shaping his case, at the outset, in the most favorable manner, may detain the court and jury, by proving any number of offences, and then elect upon which to claim a conviction. And why should this be done? He is supposed to be in possession of the proofs, and should make his election from the first. In this there can be no hardship; and such is the well settled rule in all analogous cases.” For analogous cases, see 2 Greenl. Ev., sec. 624, and notes.

The judgment below is reversed, and the cause remanded for a new trial.

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PRACTICE.—*Parties.*—*Witness.*—*Default.*—*Answer struck out.*—Where one of several defendants, who has been subpoenaed as a witness on behalf of the plaintiff, refuses to appear and testify on the trial, the court may order that his answer be struck out, and that he be defaulted.

SAME.—*Joint Answer.*—In such case a joint answer by him and a co-defendant may be struck out, so far as the former is concerned.

PROMISSORY NOTE.—*Partnership.*—*Note executed by one partner, in name of co-partner.*—*Judgment Non Obstante.*—*Interrogatories to Jury.*—*Payment.*—

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In an action against A., B. and C., as makers, on a promissory note purporting on its face to have been executed by A., in the individual names of A., B. and C., wherein B. and C. answered by a verified denial, the jury, with their general verdict against A., and in favor of B. and C., found specially, in answer to interrogatories, that A., B., C. and D. were partners at the time the note was executed; that D. was a resident of another State and unknown to the payee as a partner; that the note in suit was executed for personal property sold, and money loaned, by the payee to A., for the partnership, in the regular course of the partnership business; and that such property and money had passed into the partnership fund.

Held, that, as to B. and C., the answers to the interrogatories are inconsistent with and control the general verdict, and that judgment should be rendered against them.

Held, also, there being no plea of payment, that it was not necessary, to warrant such a judgment, that the jury should have found specially that the note was unpaid.

From the Madison Circuit Court.

H. D. Thompson, R. Lake and W. R. Pierce, for appellants.

J. A. Harrison, for appellee.

BIDDLE, J.—The appellee brought this action against the appellants, on the following promissory note:

“September the 1st, 1864.

“\$704.33. Four months after date we promise to pay to the order of B. Neely seven hundred and four thirty-three one hundredths dollars, value received, without any relief whatever from valuation or appraisement laws.”

Signed,

{ “JOHN NELSON,
“WEEMS HEAGY,
“JOHN COBURN,
“By JOHN NELSON.”

Coburn answered the complaint by a denial, sworn to.

Nelson and Heagy answered by a general denial.

Nelson also pleaded his discharge in bankruptcy.

Reply.

No question is made on the pleadings.

Upon calling the case for trial, Nelson, who had been

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served with a subpoena by plaintiff, requiring him to appear and testify in the case, was absent.

The court, on motion of the plaintiff, struck out the answer of Nelson, because, as the bill of exceptions informs us, of his failure and refusal to attend and appear in person as a witness at the trial of this cause, but in disobedience of said subpoena had gone to Indianapolis, out of the jurisdiction of said court; whereupon Nelson was defaulted.

Trial by jury; a general verdict against Nelson, and in favor of Coburn and Heagy.

With the general verdict, the jury, in answer to special interrogatories, found the following facts:

That the defendants entered into partnership with Henry Nelson, prior to the 1st day of September, 1864; that they were equal partners; that the partnership continued until the year 1865; that Henry Nelson resided in the State of Illinois, and the other defendants in Madison county, Indiana; that said partnership was formed, in part, for the purpose of buying hogs in Madison and other counties of Indiana, to be shipped and sold for the benefit of the firm; that they bought and shipped a large number of hogs, for the joint use of the firm; that, during the partnership, the defendants did the buying for said firm, in this and other counties of Indiana; that, by the agreement of partnership, the defendants were to do the firm business of buying hogs in Indiana; that, in transacting the business of the partnership, each of the defendants bought hogs for the firm; that John Nelson did the greater part of buying hogs in this county, for the firm; that John Nelson, during the existence of the partnership, and while he was buying hogs for the firm, borrowed money of the plaintiff, on the credit of the defendants as partners; that John Nelson, about the 1st day of September, 1864, and during the time he was so buying hogs, executed the note in suit; that John Nelson signed his own name,

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and the names of Coburn and Heagy, to the note, as being members of said firm, and to bind them as such; that John Nelson, during said partnership, received of the plaintiff money and hogs, to the amount of the principal named in the note; that said money and hogs so received by John Nelson were applied by him to the purposes and uses of the partnership; that the defendants were equal partners with Henry Nelson, and all shared in the money and hogs so received from the plaintiff as partners in the profits of said business; that each of the partners received about three thousand dollars, as his share of the partnership business, to which the money and hogs received for said note were applied; that Henry Nelson did not buy hogs in the State of Indiana for said firm; that the plaintiff, at the time the note was received by him, had no knowledge that Henry Nelson had any interest in the partnership; that, at the time of the execution of the note, the business of the firm was done chiefly on borrowed capital; that the plaintiff had no knowledge of any restriction upon the power of Nelson to bind the firm, at the time he took the note; and that John Nelson, John Coburn, Weems Heagy and Henry Nelson composed the members of the partnership.

The plaintiff below moved for a new trial, which was denied him. He then moved for judgment against Coburn and Heagy, on the special findings, notwithstanding the general verdict.

This motion was sustained, and judgment rendered accordingly, to which the appellants excepted.

Appeal, and error assigned in this court.

The court did not err in striking out the answer of John Nelson. This practice is authorized by the statute and approved by this court. 2 R. S. 1876, p. 155, sec. 299; *Belton v. Smith*, 45 Ind. 291.

But it is contended that the joint answer of Heagy and Nelson was still in the record, and that it was therefore

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error to default Nelson. Heagy's answer was still in the record, and he had the benefit of it on the trial, but Nelson's was not. There is no error in this. The authorities cited by the appellants do not support them on this point.

Nor did the court err in rendering judgment on the special findings, notwithstanding the general verdict. They were inconsistent with the general verdict and controlled it, and they show all the facts necessary to a recovery against Coburn and Heagy. *Campbell v. Dutch*, 86 Ind. 504; *The Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143; *Murray v. Phillips*, 59 Ind. 56.

But the appellants insist, that the special findings should show that the note had not been paid; otherwise the court could not render judgment against the defendants, even though they showed that the defendants had made the note.

It is a sufficient answer to this argument to say, that there was no answer of payment in the record.

The appellants also discuss some questions of law concerning partnership, but no such questions of law are presented by the record.

These are all the questions discussed by the appellants in their brief.

The judgment is affirmed, at the costs of the appellants, with five per cent. damages.

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CRIMINAL LAW.—*Seduction.—Indictment.*—"Promise of Marriage."—It is sufficient, in an indictment for seduction, to charge the defendant with having accomplished the seduction of the prosecutrix, "by means of a promise of marriage" previously made to her.

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SAME.—Condition of Promise.—A “promise of marriage” by means of which a seduction is accomplished, made by the defendant, to the prosecutrix, on condition that she will consent to the act of sexual intercourse, is a “promise of marriage” within the meaning of section 15, 2. R. S. 1876, p. 431, defining the crime of seduction.

SAME.—Promise by Married Man.—The seduction of an unmarried female, “under promise of marriage,” by a man whom she knows to be already married and living with his wife, does not come within said section 15.

From the LaGrange Circuit Court.

A. A. Chapin and J. D. Ferrall, for appellant.

T. W. Woollen, Attorney General, for the State.

WORDEN, J.—An indictment was found against the appellant for seduction, the charging part of which was as follows: “That Edmon Callahan, on the 18th day of November, A. D. 1877, at said county, feloniously had illicit intercourse with, and carnal knowledge of, Olive Crampton, a female of good repute for chastity and under the age of twenty-one years, by means of a promise of marriage to her previously made by the said Edmon Callahan.”

The sufficiency of the indictment was tested by motions to quash and in arrest of judgment. Plea, not guilty; trial and conviction.

The indictment was based upon the following statutory provision :

“Any person who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, under the age of twenty-one years, shall be deemed guilty of seduction, and, upon conviction, shall be imprisoned in the state-prison for not less than one, nor more than three years, and fined, not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding six months; but in such case the evidence of the female must be corroborated to the extent required, as to the principal witness, in cases of perjury.” 2 R. S. 1876, p. 431, sec. 15.

It will be seen by the statute, that, in order to constitute

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the offence, the intercourse must be had "under promise of marriage," while the indictment charges that it was had "by means of a promise of marriage." It is objected that the indictment is bad in consequence of this departure from the language of the statute.

But we are of opinion that the language of the statute, and that employed in the indictment, signify substantially the same thing. It was so held in the case of *Stinehouse v. The State*, 47 Ind. 17. The evident purpose of the statute was to make it a penal offence to have illicit carnal intercourse with a female of the description mentioned, where she is induced to consent thereto, and her consent is obtained, by or through the means of, a promise of marriage. The departure in the indictment from the language of the statute is not material. The exact language of the statute need not have been employed. 2. R. S. 1876, p. 385, sec. 59.

The indictment was good.

The appellant asked several instructions, which were refused by the court, and which need not, for the purpose of understanding the points made, be here set out at large. They were based upon two leading ideas: first, that the promise of marriage, in order to bring the appellant within the statute, must have been legal, valid and binding upon him, as matter of contract; and, second, that if the promise was made on the condition that the prosecutrix would consent to the sexual intercourse, the promise was *turpis contractus*, and void on general principles of law; and that, if such was the character of the promise, the case does not come within the statute.

It is said by Bishop, in speaking of the New York statute, which is very similar, though in some respects dissimilar, to our own, that "it has been held, that, as an element in the offence, an apparently valid promise of marriage between the seducer and the seduced is neces-

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sary; therefore, where the man is married, living with his wife, and the woman knows it, his act of seduction is not within the statute. If she were ignorant of his subsisting marriage, the consequence would be otherwise; because the promise then would be binding on him, to the extent of enabling her to maintain against him her civil suit for its breach. Moreover, he need not be of age; it is sufficient if he has arrived at puberty. If the marriage promise is made at the time when she yields to him, and not before, and is the inducement for her yielding, the case is still within the statutory provision." Bishop on Statutory Crimes, sec. 639.

We can very well understand, that, if the man making the promise was a married man, living with his wife, and the woman claimed to have been seduced knew that fact, the case could not come within the statute; because, in such case, the sexual intercourse could not, with any propriety, be said to have been had under, or by means of, the promise of marriage. In such case the promise of marriage, which the woman must know could not be fulfilled, could be no inducement to her consent to the intercourse.

But we are not prepared to say, that, in all cases there must be a valid, or apparently valid, and binding promise of marriage; one on which the promisee could maintain an action, in order to make out a case of seduction within the statute.

In the case before us there was nothing shown to invalidate the promise, unless it be that it was made upon the condition that the prosecutrix would consent to the intercourse, which the evidence tended to show. If this rendered the promise of marriage invalid, as involving moral turpitude, and if the invalidity of the promise on that ground took the case out of the operation of the statute, then the charges asked ought to have been given; otherwise, not. But both of these propositions must be main-

tained, in order to establish error in the refusal of the charges.

Was the appellant's promise of marriage void on account of having been made upon the condition that the promisee would consent to the sexual intercourse? This is a question which, for the purposes of the case, we deem it unnecessary to decide. But a reference to such authority upon it as has come under our notice may not be out of place.

It is said, in 2 Chitty Contracts, 11th Am. ed., p. 794, in speaking of contracts to marry, that, "if the promise was made by the defendant, in consideration that the plaintiff would have connection with him, it is void; but, it seems, that if he renewed the promise after the illicit intercourse had taken place, the subsequent promise would be binding."

The authorities upon the point, referred to in a note, are *Morton v. Fenn*, 3 Doug. 211, and *Hotchkins v. Hodge*, 38 Barb. 117.

The case from Douglas does not, as it seems to us, support the text. The case was tried before LORD MANSFIELD, and the evidence was, the action being for breach of promise of marriage, that the defendant promised to marry the plaintiff if she would go to bed to him that night, which she did, and lived afterward with him a considerable time. It appears, also, that the defendant several times afterward repeated his resolution to marry her, but that he afterward married another woman. The plaintiff had a verdict for two thousand pounds.

A rule *nisi* for a new trial having been obtained on the ground that it was *turpis contractus*, being on condition of plaintiff going to bed with the defendant, LORD MANSFIELD said: "I thought the objection would not lie on two grounds: 1. That before the marriage act this would have been a good marriage, and the children legitimate by the

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rules of the common law; 2: I thought so because the parties were not *in pari delicto*, but this was a cheat on the part of the man."

ERSKINE showed cause, urging that "It is absurd, that where the defendant has been guilty of no crime he shall be liable to an action, but that where he has been guilty of the grossest seduction he shall go free. In the present case, moreover, there were subsequent promises made in consideration of the defendant's good opinion of the plaintiff, which are not affected by the consideration of the first promise, even supposing that to be base."

WALLACE and BALDWIN, *contra*, insisted, that the contract was void, and that the damages were so enormously excessive as to show partiality in the jury, and improper influence.

The Court of King's Bench decided nothing, but took time to consider, and in the meanwhile recommended that the parties agree that the defendant should pay the plaintiff five hundred pounds, which was done, and thus ended the case.

If the case decides any thing on the point under consideration, it is, as expressed in the opinion of MANSFIELD, that the objection would not lie, "because the parties were not *in pari delicto*, but this was a cheat on the part of the man."

The case referred to in Barbour holds, that a contract to marry, made after seduction and in consequence thereof, is valid, and not liable to the objection that it encourages immorality; because the wrong has been already perpetrated. Perhaps the inference to be drawn from the case is, that a promise to marry, made on the condition that the promisee would consent to sexual intercourse, would have been regarded by the court as void.

But, as before intimated, we do not pass upon this ques-

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tion, inasmuch as, in our opinion, if it be conceded that the appellant's promise was void, as being conditioned upon the consent of the prosecutrix to the intercourse, the case still comes within the letter and spirit of the statute.

There is nothing in the statute that requires the promise of marriage to be free from all legal objections, viewed as the foundation of an action for its breach. Its purpose was to prevent the obtaining of the female's consent to sexual intercourse, by means of a promise of marriage; to protect her from the arts of designing and unprincipled men, in whom she may repose trust and confidence, and to whose solicitations she may yield, believing that their promises of marriage are made in good faith, and will be fulfilled. It is not to be supposed that she will pause to consider, even if she were capable of judging, whether the promise is valid in law, and one on which she could maintain an action if broken. It is not to be assumed in such case, that her consent to the intercourse is given in consequence of her reliance upon an action upon the promise, for damages, in case of its breach; but it may be given upon the confidence she places in the good faith of the promise, believing, not that it will be broken, but fulfilled. We are supported in these views by the decisions of the Court of Appeals of New York.

In the case of *Kenyon v. The People*, 26 N. Y. 203, which was a prosecution for seduction, the court said, "The judge charged the jury that if they were fully satisfied from the evidence that the defendant promised to marry the prosecutrix, if she would have carnal connection with him, and she believing and confiding in such promise, and intending on her part to accept such offer of marriage, did have such carnal connection, it is a sufficient promise of marriage under the statute. This seems to me unobjectionable. It is not necessary that the promise should be a valid and binding one between the parties.

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The offence consists in seducing and having illicit connection with an unmarried female, under promise of marriage. It is enough that a promise is made which is a consideration for or inducement to the intercourse. But if the statute required the promise to be a valid one, the charge was correct. A mutual promise, on the part of the female seduced, is implied if she yields to the solicitations of the seducer, made under his promise to marry." See, also, *Boyce v. The People*, 55 N. Y. 644.

We are of opinion, for these reasons, that no error was committed in refusing the charges.

We may observe that the charges given by the court very fairly placed the law of the case before the jury, even if some of them were not more favorable to the defendant than he could legally claim.

We have carefully read the evidence, and feel clear that we should not disturb the finding of the jury.

The evidence is entirely too long to be set out in this opinion. That offered by the State clearly made out the case, and, in our opinion, the prosecuting witness, Olive Crampton, was corroborated to the extent required by the statute. There was, to be sure, a conflict in the evidence. The defendant swore that he not only never promised to marry the prosecuting witness, but that he never had connection with her. But it was for the jury to determine what witnesses were most entitled to credence.

We find no error in the record.

The judgment below is affirmed, with costs.

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SUPREME COURT.—*Weight of Evidence.*—The Supreme Court, on appeal, will not disturb the verdict of a jury upon the mere weight of evidence.

Wiles v. The Trustees of Philippi Church.

From the Huntington Circuit Court.

J. A. Branyan and *C. W. Watkins*, for appellants.

L. P. Milligan and *A. Moore*, for appellee.

PERKINS, J.—Suit by appellee, against appellants, to recover for money had and received by the appellants to the use of appellee.

A demurrer to the complaint was overruled, but no exception was entered.

Answer in general denial, and, in a second paragraph, in confession and avoidance. The second paragraph was struck out on motion, as being embraced in the general denial.

Jury trial; verdict for the appellee, for one hundred and seventy-six dollars and twenty-one cents.

A new trial was granted.

The cause was again tried by a jury, and a verdict returned in favor of the appellee, for one hundred and seventy-six dollars and twenty-one cents.

A motion for a new trial, for the reason that the verdict was contrary to law and the evidence, was overruled, and exception taken. Judgment was rendered on the verdict.

It is assigned for error, that the court erred in overruling the motion for a new trial.

A bill of exceptions contains the evidence.

Two juries have found upon it for the appellee.

We can not say that it does not tend to support the verdict on the second trial, the verdict that is before us.

The judgment is affirmed, with costs and five per cent. damages.

Petition for a rehearing overruled.

WILES v. THE TRUSTEES OF PHILIPPI CHURCH.

DEMURRER.—*Capacity to Sue.*—*Church Trustees.*—*Corporation.*—A demurrer questioning the sufficiency of a complaint by a plaintiff styled "The

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Trustees of " a certain " Church " does not question, but admits, the plaintiff's capacity to sue.

SAME.—*Corporate Existence not put in Issue by General Denial.*—Such plaintiff's corporate existence is not put in issue by an answer of general denial, nor by an answer specially alleging that certain persons named in the complaint as such trustees are, in fact, not the trustees.

SAME.—*Evidence.—Instructions.—Harmless Error.*—Under the issues made by such pleadings, error in the admission of evidence, or in the giving of instructions to the jury, relating to the corporate existence of the plaintiff, is harmless.

SAME.—The mere fact that an instruction to a jury is " out of place and not pertinent to the issues " is not ground for new trial, nor for reversing the judgment.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellant.

BIDDLE, J.—The trustees of the Philippi Church brought this complaint, to enforce the specific performance of a contract alleged to have been made by the appellant, to convey certain grounds to the church.

A demurrer to the complaint, alleging the insufficiency of the facts to constitute a cause of action, was overruled. The appellant excepted.

Answer in denial, and by two special paragraphs. Demurrers were overruled to the two special paragraphs, but no question is made upon them.

Trial, verdict, and judgment decreeing the specific performance as prayed.

By a bill of exceptions, the evidence, and several questions arising upon the admission of evidence, and the instructions given to the jury, are brought before us.

In support of the demurrer to the complaint, the appellant argues that the corporate organization of Philippi Church is not sufficiently shown, and that it has no capacity to sue; but these questions are not raised by a demurrer for the want of facts. Such a demurrer admits the organization, and the capacity to sue. *Jones v. The Cincinnati Type Foundry*, 14 Ind. 89; *Heaston v. The Cincin-*

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nati and Fort Wayne R. R. Co., 16 Ind. 275; *The Board of Commissioners, etc., v. Bright*, 18 Ind. 93; *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274; *Debolt v. Carter*, 31 Ind. 355; *Collins v. Nave*, 9 Ind. 209; *Story v. O'Dea*, 23 Ind. 326.

The appellant insists, that, under the issues, the appellee was bound to prove its corporate existence. We think not. The general denial does not put in issue the corporate existence; nor did the third paragraph of answer, which alleges that certain persons named therein are not the trustees of Philippi Church. It is immaterial what the personal names of the trustees are; the Philippi Church exists all the same. The names of the trustees are alleged in the complaint, but this is immaterial, especially when the existence of the corporation is not put in issue. In addition to the above authorities, we cite the following: *Wert v. The Crawfordsville and Alamo Turnpike Co.*, 19 Ind. 242; *The Adams Express Co. v. Hill*, 43 Ind. 157; *The Indianapolis Furnace and Mining Co. v. Herkimer*, 46 Ind. 142; *The Presbyterian Church of Roanoke v. Horton*, 50 Ind. 223; *The Trustees of the Christian Church of Wolcott v. Johnson*, 53 Ind. 273.

The appellant also complains of the introduction of a written paper as evidence, showing the appointment of the trustees, but, in his objections to it at the trial, he did not point out what the objection was; he therefore has waived it, if any existed. But we perceive no objection to the paper, nor to the parol evidence introduced to prove the same fact. *Hamrick v. Bence*, 29 Ind. 500. But, as we have remarked, we do not think the validity of the corporation, or its capacity to sue, was put in issue. The answer of general denial simply denies the cause of action, not the existence of the corporation nor its capacity to sue; and the special paragraphs admit the cause of action, and endeavor to avoid it. They also admit the existence of the corporation, and its capacity to sue.

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The instruction numbered 1, which is complained of, goes to the corporation and election of the trustees, and if it was even wrong, would be harmless, as these questions were not within the issues.

Instruction numbered 2 goes to the certificate of the election of the trustees, and is all in favor of the appellant. He can not complain of it.

The only objections made to the third instruction given by the court, and to the second one given as asked by the appellee, are, that they were "out of place, and not pertinent to the issues." We could not reverse the judgment for these reasons, where it is so plain, as in this case, that they, the instructions, are harmless.

There is no available error in the record.

The judgment is affirmed, at the costs of the appellant.

THE STATE, EX REL. PAGE, GUARDIAN, v. PAGE ET AL.

GUARDIAN AND WARD.—*Release of Surety, and Execution of New Bond.—Action on Old Bond.—Answer.*—Where, by order of the proper court, upon his own application, a surety on a guardian's bond is released from his suretyship, and a new bond, with new surety, has been executed, he is thereby released as to any future liability on such bond; but such facts constitute no answer, on behalf of such surety, to a complaint on the old bond, for a prior breach.

SAME.—*Former Recovery.*—An answer in such action, by such surety, alleging a former recovery by the plaintiff, in an action on such new bond, against such guardian and the new surety, is insufficient on demurrer.

From the Warrick Circuit Court.

S. B. Hatfield, C. A. DeBruler and E. R. Hatfield, for appellant.

I. S. Moore, for appellees.

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The State, ex rel. Page, Guardian, v. Page et al.

NIBLACK, J.—This was an action by the State, on the relation of Minerva Page, guardian of Samuel F. Page and others, minor children and heirs at law of Reuben S. Page, deceased, against William D. Page, Andrew J. Miller and William S. Harpole, on a guardian's bond, in which the said William D. Page was the principal obligor.

The complaint stated, that, on the 13th day of January, 1873, the said William D. Page was appointed guardian of the persons and estates of the minor heirs above referred to, and executed a bond as such guardian, with the said Miller and Harpole as his sureties; that there immediately came into the hands of the said William D. Page, as such guardian, the sum of two thousand dollars, which he, during the months of April, May and June, in said year 1873, converted to his own use, and which he had failed to pay over to the relatrix, as he was ordered and directed to do by the Warrick Circuit Court.

The defendant Page made default. The other defendants, Miller and Harpole, answered in three paragraphs:

1. The general denial, which was subsequently withdrawn;

2. That, in June, 1874, they made application by petition to the said Warrick Circuit Court to be released from liability as sureties on the bond sued on, and that, on the 11th day of July, 1874, their petition coming on to be heard, it was ordered by said court, that they be released as such sureties, and that their codefendant, Page, should execute a new bond as such guardian, which he thereupon did execute, with one Levi Wilkerson as his surety; and,

3. Setting up substantially the same facts as in the second paragraph, and averring, that, in an action on the relation of the said Minerva Page, against the said William D. Page and the said Levi Wilkerson, on said new bond, the relatrix recovered a judgment in said Warrick Circuit Court, against the said William D. Page and Levi Wilker-

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son, for the sum of one thousand six hundred and forty-nine dollars and forty cents, and costs of suit, which judgment was in full force, unreversed and unsatisfied.

The plaintiff demurred to the second and third paragraphs of the answer above set out, but the demurrer was overruled, and the plaintiff standing on the demurrer, and declining further to reply to said paragraphs, judgment was rendered in favor of said Miller and Harpole, and against the relatrix, for costs.

We are, therefore, only required to consider the sufficiency of the second and third paragraphs of Miller's and Harpole's answer.

Section 29 of the act concerning the settlement of decedents' estates, and prescribing the duties of executors and administrators, provides, that "Any surety may apply to the proper court * * * to be released from his bond with such executor or administrator, by filing his request therefor with the clerk of such court, and giving ten days' notice thereof to such executor or administrator, when such court shall release such surety; and if such executor or administrator fail to give new bond or surety, as by it directed, he shall be removed, and his letters superseded; * * * and such original surety shall be liable only for the acts of such executor or administrator from the time of the execution of the original to the filing of such new bond." 2 R. S. 1876, p. 504.

Section 165 of the same act, page 552, *supra*, further provides, that, "When any new bond shall be required of an executor or administrator, the sureties in the prior bond shall, nevertheless, be liable for all breaches of the conditions of such prior bond, committed or suffered before the new bond shall be approved by the court," etc.

Section 26 of the act in relation to guardians and wards still further provides, that "Sureties in the bond of any guardian may be discharged from future liability therein

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under the same rules and regulations prescribed for the discharge of the sureties in the bond of executors and administrators, and all enactments on that subject shall apply to guardians and guardians' bonds and sureties." 2 R. S. 1876, p. 598.

From these sections of the statute, it is evident that when a surety in a guardian's bond is, upon his own application, released from his suretyship by order of the proper court, he is released only as to future liability on such bond, and not from any liability that may have already occurred upon it. Consequently, to a charge that a guardian had, in April, May and June, 1873, converted the assets of his wards to his own use, as in the case at bar, it is not a sufficient answer for his surety to say, that, more than a year after such conversion, he was discharged from liability on such guardian's bond. *Bales v. The State, ex rel., etc.*, 15 Ind. 321; *Owen v. The State, ex rel., etc.*, 25 Ind. 371; *Lane v. The State, ex rel., etc.*, 24 Ind. 421; *Lane v. The State, ex rel., etc.*, 27 Ind. 108; *Vivian v. Otis*, 24 Wis. 518; *Cook v. The State, ex rel., etc.*, 13 Ind. 154.

An answer of a former recovery must make it appear that there is an identity between the present and the previous cause of action, and that the parties in the present action are the same as in the previous one, or else that they claim under the parties to such previous action. *Bigelow Estoppel*, p. 27; 1 *Greenl. Ev.*, sec. 532; 1 *Chitty Pleading*, 16th Am. ed., p. 170, and notes.

Applying these rules to the third paragraph of the answer before us, the former recovery, attempted to be set up in that paragraph, was not well pleaded.

We are therefore of the opinion, that both the second and the third paragraphs of Miller's and Harpole's answer were bad upon demurrer, and that, because the court below held otherwise, the judgment in this action must be reversed.

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The judgment is reversed, at the costs of the appellees, and the cause remanded for further proceedings not inconsistent with this opinion.

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SOWLE v. HOLDRIDGE ET AL.

SPECIFIC PERFORMANCE.—*Complaint Against Widow and Heirs, to Enforce performance of Ancestor's Contract. — Conveyance. — Mortgage. — Tender. — Demurrer Carried Back.*—A. and B. executed a written contract, wherein the former, for a specified sum of money, agreed to convey a certain tract of land to the latter, by a "good and sufficient deed; and B. agreed therein to procure certain moneys and pay the same to A., as part of the purchase-money, and to execute to A. a mortgage on a specified portion of such land, to secure the payment of the residue of such purchase-money; and all of such stipulations were to be performed on a day in the future, named in the contract. B. having died subsequent to such day for performance, A. brought an action against the widow and heirs of B., to enforce specific performance of such contract, alleging in his complaint, that, on such day, he had executed and tendered to B. a "good and sufficient deed" for such land, and had demanded performance, by B., of his stipulations, which the latter refused; that, subsequent to B's death, he had tendered the same deed to the defendants, and demanded of them the performance of B's stipulations, which they refused; that the same deed was brought into court for the defendants; that such land had remained in the possession of B. and the defendants ever since the execution, and pursuant to the terms, of such contract; and that such contract was executed as a settlement of an action then pending between A. and B., concerning the title to such land.

Held, on demurrer to the defendants' answer, that such tender to the defendants was insufficient, and that the demurrer should be carried back and sustained to the complaint.

From the Steuben Circuit Court.

D. E. Palmer and *G. A. Knickerbocker*, for appellant.

J. Morris, J. A. Woodhull, J. I. Best and *W. G. Croxton*, for appellees.

Howe, C. J.—On the 6th day of November, 1875, the appel-

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lant filed in this court a transcript of the record in this action, with an assignment of errors thereon, and the cause was docketed as No. 5,205 of this court.

Afterward, in April, 1876, upon an affidavit filed, showing a diminution of the record, a writ of *certiorari* was awarded, upon the appellant's motion, requiring the clerk of the Steuben Circuit Court to certify to this court a complete transcript of the record of said cause. This writ was never returned, but, in obedience thereto, the clerk of the circuit court certified to this court such complete transcript of the record. Through inadvertence, this latter transcript was filed on the 1st day of August, 1876, and docketed as an original cause, No. 5,769, in this court. From an examination of the two transcripts, which have been filed and docketed as separate causes, it is apparent that they are both copies of the record of one and the same cause. We shall so consider the two transcripts, in our examination and decision of the case.

The suit was commenced by the appellant, as plaintiff, against the appellees, as defendants, on the 9th day of November, 1870. The appellant's complaint contained four paragraphs, in each of which he sought to enforce the specific performance of a written contract, entered into on the 19th day of October, 1858, by and between him, the appellant, and one Dudley Holdridge, then in full life but since deceased, the ancestor of the appellees in this action. Omitting the signatures of the parties, the following is a copy of said written contract, to wit:

“Articles of agreement, made this 19th day of October, A. D. 1858, between Francis Sowle and Dudley Holdridge, as follows, to wit: Sowle agrees to convey the S. E. $\frac{1}{4}$, section 28, Tp. 37 N., R. 14 E., in Steuben county, Indiana, to Dudley Holdridge, for the consideration of nine hundred dollars, making good and sufficient deed therefor; and said Holdridge agrees to pay therefor the sum of nine

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hundred dollars, as follows, to wit: Said Holdridge is to obtain and pay down to Sowle the amount tendered and paid into court in the case of *Sowle v. Holdridge*, now pending in the St. Joseph Circuit Court, Indiana, and the balance in payments, one-third one year from this date, one-third two years from this date, the balance three years from this date, with use, and waiving valuation laws of Indiana, and execute a mortgage on the west half of said quarter section, for the payment of the same, and the performance of these stipulations; and it is agreed, that the parties shall pay their witness fees respectively, and the balance of the costs of suit, each to pay one-half in the suit aforesaid; and Holdridge is to pay taxes of 1858 on the land.

“The performance of the above stipulations, respectively, to be done on the 3d of November next; and for the performance the parties bind themselves in the sum of one thousand dollars. Witness,” etc.

Each of the four paragraphs of the appellant's complaint counts upon the said written contract or agreement; and in each of said paragraphs it was alleged, in substance, that, on the 3d day of November, 1858, the appellant had executed and tendered to said Dudley Holdridge a good and sufficient deed of said land, and demanded performance by said Holdridge of the stipulations of said contract on his part to be performed, which he, the said Holdridge, had then and ever since neglected and refused to do and perform; that since the execution of said written contract, on October 19th, 1858, the said Dudley Holdridge and his heirs, the appellees, had continued and then were in the possession of said real estate, under said contract; that, on said 19th day of October, 1858, there was pending in the St. Joseph Circuit Court, on a change of the venue thereof from the Steuben Circuit Court, a suit between the said appellant and said Dudley Holdridge, wherein the

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title to, and ownership of, said real estate were in issue, and were claimed by said Holdridge, which said suit was then compromised and discontinued upon the terms stated in said written contract, by which compromise the title to said real estate was conceded to be in the appellant, and said Dudley Holdridge purchased the same upon the terms mentioned in said contract; that the entire purchase-money mentioned in said written contract remained unpaid; that the said Dudley Holdridge, on the — day of —, 1864, departed this life intestate, leaving the appellees as his widow and heirs at law; that the appellant had fully performed all the stipulations of said written contract on his part to be performed; and that he, the appellant, on the 1st day of October, 1869, tendered to the appellees the same deed, so executed and tendered by him as aforesaid, to said Dudley Holdridge, and demanded that they, the appellees, should fulfil the said contract on their part, which they refused to do; and that he, the appellant, then brought "the same deed" into court, to be delivered to the appellees upon their payment of the amount due under said contract, or when the court should decree that he had a lien upon said real estate for said amount. Wherefore, etc.

The appellees answered in eight paragraphs, the first two of which were subsequently withdrawn. To each of the remaining paragraphs the appellant demurred, for the alleged insufficiency of the facts therein to constitute a defence; which demurrers were severally overruled, and to each of these decisions the appellant excepted.

The appellant replied in ten paragraphs to the remaining answers of the appellees. The fourth and tenth replies were struck out by the court, on the appellee's motion, and to this decision the appellant excepted.

The cause was tried by the court, without a jury, and a finding made for the appellees

The appellant's motion for a new trial having been overruled, and his exception saved to such ruling, judgment was rendered on the finding, against the appellant, and he now prosecutes this appeal therefrom, in this court.

All the decisions of the circuit court, adverse to him, have been assigned in this court by the appellant, as alleged errors, and need not be repeated.

The controlling question in this case, as it seems to us, may be thus stated: Does it appear from the record of this cause, that, at the time this suit was commenced, the appellant was entitled, as against the appellees, to a specific performance of the written contract counted upon and described in the several paragraphs of the appellant's complaint?

The evidence on the trial in the circuit court is not set out in the record; and therefore the question stated must be answered upon the hypothesis that the matters alleged in the several paragraphs of the complaint are true, as therein alleged. Upon his own showing, was the appellant entitled, as against the appellees, to a specific performance of the written contract?

As we have seen, this contract was entered into, by and between the appellant and said Dudley Holdridge, on the 19th day of October, 1858. By its terms, the contract was to be performed by both the parties thereto, on the 3d day of November, then next ensuing, or in fifteen days after its date. In each paragraph of his complaint, the appellant alleged, that, on said last named day, he had performed his part of said contract, had executed and tendered a good and sufficient deed of the real estate described to the said Dudley Holdridge, and had demanded of him performance of the stipulations of the contract, on the part of him, the said Dudley Holdridge, to be done and performed. But Dudley Holdridge neglected and refused to perform his part of said contract. He lived for about six years after

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the date of the contract; and the record fails to show, that, during those years, the appellant made any effort to enforce the performance of the contract. In 1864, Dudley Holdridge died, and about six years afterward, on the 9th day of November, 1870, the appellant commenced this action against the appellees, the widow and heirs at law of said Dudley Holdridge, to enforce the performance of said contract.

It will be seen from the copy of the contract set out in this opinion, that the agreements of the parties were mutual, and the acts to be performed thereunder were to be concurrent. It is clear, therefore, that the appellant could not enforce this contract against Dudley Holdridge or his heirs at law, until he, the appellant, had done and tendered the performance of that which he was required to do, by the terms of said contract. If the appellant had commenced his action against Dudley Holdridge, and prosecuted the same against him, in his lifetime, to final judgment, then, we think, that the averments of his complaint would have shown, with sufficient certainty, his execution and tender of a sufficient deed, before the commencement of his action. But Dudley Holdridge died long before this suit was commenced, and when he died, the deed, which the appellant made but did not deliver, to him, became inoperative and of no effect. The tender of the deed, without the delivery thereof, to said Dudley Holdridge, certainly did not convey to him any title to, or interest in, the said real estate; and we are clearly of the opinion, that, after his death, neither the tender nor, indeed, the actual delivery of "the same deed" to his heirs at law would convey to them any title or interest whatsoever in or to the said real estate.

In our opinion, the appellant's complaint in this action, and each and every paragraph thereof, were defective and insufficient, in this: that they, and each of them, failed to

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show, by proper averments, that the appellant had, before this suit was brought against the appellees, as the widow and heirs at law of said Dudley Holdridge, deceased, made and tendered to them "a good and sufficient deed" of the real estate described in said written contract;—and in this: that they and each of them failed to bring into court such deed to the appellees, and to continue the tender thereof to the appellees, by any proper averments. *Parker v. McAllister*, 14 Ind. 12; *Smith v. Turner*, 50 Ind. 367; *Melton v. Coffelt*, 59 Ind. 310.

The demurrers to the answers, we think, should have been sustained as to each paragraph of the complaint.

Other questions have been presented and ably and elaborately argued, by the learned counsel of the respective parties; but we need not and do not consider them, as the conclusion we have reached, in regard to the insufficiency of the appellant's complaint, will necessarily lead, in this case, to the affirmance of the judgment.

The judgment is affirmed, at the appellant's costs.

NOTE.—Worden, J., having been of counsel in this cause, was absent when the same was considered.

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PLEADING.—*Complaint on Bond of Guardian of Habitual Drunkard.*—*Copy.*
—*Exhibit.*—In an action on the bond of the guardian of an habitual drunkard, the bond itself, or a copy thereof, must be filed with the complaint as an exhibit.

From the Gibson Circuit Court.

A. P. Twineham and R. M. J. Miller, for appellants.

W. M. Land, for appellee.

BIDDLE, J.—The State of Indiana, on the relation of

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George N. Jerauld, filed the complaint in this case, against Richard M. J. Miller and his sureties, founded on the bond of said Miller, executed as the guardian of the person and property of James A. Devin, an habitual drunkard.

Two breaches were assigned.

A demurrer, alleging the insufficiency of the facts stated in the breaches to constitute a cause of action, was overruled to the complaint, and exceptions reserved.

An answer was filed, issues joined, trial and subsequent proceedings had, which resulted in a judgment for the appellee. Appeal.

An assignment of error is made in this court, amongst others, that the court erred in overruling the demurrer to the complaint; and this error, we think, is well taken. There is no copy of the bond alleged to have been filed with the complaint to be found in the record; nor does it appear that the bond was ever made an exhibit. This defect in the complaint may be an oversight, and probably is, but it compels us to reverse the judgment, at the costs of the relator, and remand the cause for further proceedings—all of which is done.

Petition for a rehearing overruled.

WRIGHT, ADMINISTRATOR, v. MILLER.

PRACTICE.—*Evidence.*—*Witness.*—*New Trial.*—*Assignment of Error.*—

Supreme Court.—Error in the admission of evidence, or in permitting one to testify as a witness, is proper ground for a motion for a new trial, but can not be independently assigned as error, in the Supreme Court on appeal.

SAME.—*Consent to a New Trial, by opposite party.*—The consent of a party, that a new trial, moved for by the opposite party, may be granted,

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does not necessarily render erroneous the action of the court in overruling such motion.

SAME.—Record.—A mere allegation of such consent, in the motion for a new trial, is not sufficient evidence to the Supreme Court, on appeal, that such party had actually consented that a new trial might be granted.

DECEDENTS' ESTATES.—Claim.—Contract.—Infant.—Limitations.—A claim was filed against the estate of a decedent, for ten years' continuous services, completed two years previous to the filing of the claim, rendered for the decedent, by the claimant, under a promise of compensation fixing no specified amount, the first half of which term of service was during the infancy of the claimant.

Held, that the claim was not barred by the statute of limitations.

From the Montgomery Circuit Court.

J. McCabe and *J. Wright*, for appellant.

J. R. Courtney, for appellee.

PERKINS, J.—Josephine Miller, on the 25th of August, 1874, filed a claim in the Montgomery Circuit Court, against the estate of Cornelius Britton, deceased, of which James Wright was administrator, for five hundred and fifty-four successive weeks' work, from October, 1862, at two dollars and a half per week.

The claim was verified.

A motion to reject the claim was overruled, and exceptions entered.

Answer, the general denial; the statute of limitations; that said Josephine worked for her board, etc., and that she lived with said Britton, deceased, as a member of his family, without any contract for pay, etc.

Reply in denial; trial by jury; verdict for plaintiff, in the sum of three hundred and fifty dollars.

Motion for a new trial overruled, and judgment on the verdict. Exceptions reserved.

The motion for a new trial assigned the following reasons therefor:

"1. That the verdict of the jury is contrary to law;

"2. That the verdict of the jury is not sustained by sufficient evidence;

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“3. That the court had no jurisdiction over the persons of the parties to the action ;

“4. That the court had no jurisdiction over the subject of the action ;

“5. Because the verdict of the jury, or the damages assessed, are excessive ; and,

“6. The plaintiff has consented to the granting of a new trial.”

The assignment of errors is as follows :

“1. The court erred in overruling defendant’s motion to reject the claim of plaintiff ;

“2. The court erred in admitting the evidence of Hannah Miller ; and,

“3. The court erred in overruling the motion for a new trial.”

We proceed to consider and decide upon the errors assigned.

1. The court did not err in overruling the motion to reject the claim of the plaintiff.

2. The action of the court in admitting the evidence of Hannah Miller, might have been assigned as a cause for a new trial, but can not be assigned as error, in this court. It was not made a ground of a motion for a new trial.

3. The third error assigned is the overruling of the motion for a new trial.

Counsel for appellant, in his brief, says : “As to the 3d, 4th and 5th grounds for a new trial, we have no very strong reasons for pressing them as sufficient.”

As to the 6th, the record shows no consent of the opposite party, except the allegation in the motion for a new trial, and the court may not have conceded the truth of that allegation. And such consent, had it been given, would not necessarily have made it error in the court to overrule the motion.

The only remaining question is: Was the verdict

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sustained by the evidence? The evidence tended to prove that the appellee, Josephine, worked in the family of Cornelius Britton, deceased, at least five years after she arrived at the age of twenty-one years; that she was industrious, working in the house, and in the field as a farm hand, when required; that she commenced working under promise of compensation, without a fixed price, and continued after she became of age, without a new contract; that her services were worth from two dollars and a half to three dollars a week, or, in the aggregate, over six hundred dollars. She recovered for a little more, perhaps, than half of the time she worked after becoming of age. We can not say, that she was not entitled to recover compensation, nor that the amount recovered was excessive.

The claim was not barred by the statute of limitations. 2 R. S. 1876, p. 121.

The judgment is affirmed, with costs.

 UMPHREY v. THE STATE.

CRIMINAL LAW.—*Larceny*.—*Intent in Taking*.—To constitute larceny, the taking must be with a felonious intent existing at the time of the taking.

SAME.—*Trespass*.—A mere tortious taking of personal property, without felonious intent, is not a larceny.

From the Marshall Circuit Court.

A. B. Capron, A. C. Capron and M. Nye, for appellant.
T. W. Woollen, Attorney General, for the State.

Howk, C. J.—At the October term, 1877, of the Marshall Circuit Court, an indictment of a single count was returned into court against the appellant. In this indictment it was

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155	559

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charged, in substance, that the appellant, "Richard Umphrey, did then and there, on the 27th day of April, 1877, at the county of Marshall and State of Indiana, feloniously steal, take, ride and drive away one dark brown horse, of the value of one hundred dollars, the personal goods and chattels of Amos B. Peters, then and there being found, contrary to the form of the statute," etc.

- The appellant waived an arraignment on said indictment, and for plea thereto said that he was not guilty.

The issues joined were tried by a jury, and a verdict was returned, finding the appellant guilty, as charged in the indictment, and assessing his punishment at imprisonment in the state-prison for the term of two years, a fine of seventy-five dollars, and disfranchisement, etc., for the term of three years. And the appellant's written motion for a new trial having been overruled, and his exception saved to such decision, judgment was rendered on the verdict.

The only alleged error, properly assigned by the appellant in this court, is the decision of the circuit court, in overruling his motion for a new trial.

As necessary to a proper understanding of this cause and of our decision thereof, we give a summary of the facts shown by the evidence set out in the record. The appellant was a youth of twenty years of age, the son of a widow. He had lived in Marshall county for about three years, and had worked for a considerable time, as a hired laborer, for Amos B. Peters, the owner of the horse charged to have been stolen. Some two days before the day on which it was alleged that he had stolen said horse, the appellant had been arrested by a constable in said county, on a charge of petit larceny. The constable had treated him kindly, and had kept him for two days in custody, without committing him to jail. In the evening of April 27th, 1877, his trial on the charge of petit larceny

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resulted in his acquittal, or rather his discharge from custody, on that charge. After the trial, the constable advised him to leave the country for a while. That night the horse described in the indictment was taken from the stable of its owner, Amos B. Peters, and also a bridle and halter.

Two days afterward, the appellant was arrested in Miami county, in this State, charged with the larceny of the horse. The only evidence introduced on the trial, which tended to connect the appellant with the taking of the horse, was his own statements or confessions, after his arrest and while he was in custody. At first, he denied the taking of the horse; but subsequently, on the same day, he stated that he had taken the horse from the stable of its owner, about nine o'clock in the evening,—had travelled on it all night, in going to Miami county, where he had formerly lived,—and that, about daylight of the ensuing morning, he had dismounted from the horse, and, fastening up the bridle and halter reins, he had turned the horse loose, and started him back toward the home of his owner, Amos B. Peters, fully believing and expecting the horse would find his way there. The appellant informed Mr. Peters of the place where he had turned the horse loose and started him back homewards; and in the vicinity of that place, Peters found his horse, bridle and halter. Peters testified that the appellant “always said that he had just taken my horse to ride, and that he thought, when he turned him loose, that he would go directly home, without any trouble.”

There was no evidence introduced on the trial, from which it could be reasonably inferred, as it seems to us, that the appellant had taken the horse for any other or different purpose, or with any other or different intent, than the purpose or intent indicated and expressed by him in all his statements or confessions, given in evidence. Not

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→ a fact was established by the evidence, from which it might be fairly inferred, that, when the appellant took the horse, or at any time afterwards, he ever intended to deprive Amos B. Peters of his horse, or to convert such horse to his own use. In other words, the felonious intent, which is an essential element in every larceny, was not shown by the evidence; nor was any fact established, from which such felonious intent could be fairly and reasonably inferred. The evidence failed to show, as we read it, that, in the taking of the horse of Amos B. Peters, the appellant was guilty of a larceny. To constitute this offence, the taking must be felonious, and the felonious intent must exist at the time of the taking. *Keely v. The State*, 14 Ind. 36; *Hart v. The State*, 57 Ind. 102; Bicknell Crim. Prac. 329. At most, it seems to us, the appellant was a trespasser, in the taking of the horse.

We are constrained to say, that the verdict of the jury in this case, in our opinion, was contrary to law, and was not sustained by any sufficient evidence. The court erred, we think, in overruling the appellant's motion for a new trial.

The judgment is reversed, and the cause is remanded for a new trial. The clerk of this court will issue the proper notice to the warden of the state-prison, for the appellant's return to the sheriff of Marshall county.

SCHAFER v. SMITH.

LIQUOR LAW.—Act of 1873, Section 12.—Action by Wife.—Exemplary Damages.—Interrogatory to Jury.—Remittitur.—Supreme Court.—On the trial of an action by a married woman, instituted under the 12th section of the act of February 27th, 1873, Acts 1873, p. 151, regulating the sale of intox-

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icating liquors, to recover damages for the act of the defendant in unlawfully causing the intoxication of her husband, the jury trying the cause, with their general verdict assessing damages in favor of the plaintiff, returned an interrogatory put to them, answering that a specified sum of the damages assessed by their general verdict was allowed as exemplary damages.

Held, that the allowance of exemplary damages was unauthorized.

Held, also, that the exemplary damages should be remitted, in the Supreme Court on appeal, or the judgment reversed.

From the Pike Circuit Court.

G. G. Reily, C. H. McCarty and E. A. Ely, for appellant.

F. B. Posey, J. E. McCullough and J. H. Miller, for appellee.

NIBLACK, J.—This was an action by Elizabeth Smith, as the wife of Albert Smith, against Charles Schafer, under the 12th section of the act to regulate the sale of intoxicating liquors, approved February 27th, 1873, Acts 1873, p. 151, for unlawfully, wilfully, maliciously, and after notice not to do so, selling intoxicating liquors to the said Albert Smith, her husband, thereby causing him frequently to become intoxicated, and thus injuring her in her person, property and means of support.

A demurrer to the complaint, for want of sufficient facts, was overruled, and the defendant answered in general denial.

The jury trying the cause returned a verdict for the plaintiff, assessing her damages at the sum of five hundred dollars, and to a special interrogatory submitted to the jury by the court, requiring them to state how much, if any thing, they allowed the plaintiff for exemplary damages, they answered, "Two hundred dollars."

After overruling a motion for a new trial, the court rendered judgment on the verdict.

Errors are assigned here upon the overruling of the de-

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murrer to the complaint, and upon the refusal of the court to grant a new trial.

No objection being urged to the complaint in this court, we are not required to consider its sufficiency, but are justified in assuming, that the demurrer to it was correctly overruled.

No question is made here, either, as to the sufficiency of the evidence to sustain so much of the verdict as relates to the general damages which were assessed by it against the appellant. The appellant only objects to so much of the verdict as allowed exemplary damages against him, as above stated. He insists, that the damages were excessive, because of the exemplary damages thus allowed, and that, for that reason, a new trial ought to have been granted.

This question of exemplary damages has been fully discussed and ruled upon by this court, in the case of *Kærner v. Oberly*, 56 Ind. 284.

In that case, it was decided, that, in cases like the one before us, in which the defendant might be punished criminally for the offence charged against him, in addition to his civil liability, exemplary damages could not be allowed.

It is unnecessary for us here to repeat the reasons assigned for that decision. It is sufficient for us now to say, that the doctrine of that case is well sustained by the essential principles of justice, as well as by a series of well considered and carefully adjudicated cases, and that we recognize that case as of binding authority in the case at bar.

Upon the authority of that case, therefore, we are constrained to hold, that so much of the judgment as embraces the exemplary damages allowed by the jury is erroneous.

As the amount for which the judgment was erroneously entered was definitely fixed at two hundred dollars, by the

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jury, in their answer to the special interrogatory addressed to them under the direction of the court, an opportunity is afforded for the correction of the judgment by the entry of a *remittitur* for that sum.

If, therefore, the appellee shall, within sixty days herefrom, enter a *remittitur* of two hundred dollars of the judgment herein appealed from, to take effect from the date of such judgment, then the residue of the judgment will be affirmed, at her costs.

If a *remittitur* shall not be entered within the time indicated, then the entire judgment will be reversed, at her costs.

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JUDGMENT.—*Entering and Signing of.*—*Statute Construed.*—*Duties of Judge and Clerk.*—Section 22 of the circuit courts act of June 1st, 1852, 2 R. S. 1876, p. 10, in relation to the entering and signing of judgments, and the issuance of process thereon, is directory merely.

SAME.—*When Execution may be Issued.*—Such section contemplates, that single judgments or decrees may be immediately read and signed, separately from the other proceedings of the same day, so that executions may at once be issued thereon.

SAME.—*Irregularity in Issuing Execution may be Taken Advantage of only by Defendant.*—*Parties.*—Irregularity in the issuance of an execution can be objected to, not by the plaintiff in any other execution or judgment against the same defendant, but only by the defendant himself; and even then only in a direct, and not in a collateral, proceeding.

From the Tippecanoe Circuit Court.

R. C. Gregory, W. B. Gregory, J. R. Parmelee and L. L. Norton, for appellants.

B. W. Langdon, for appellees.

PERKINS, J.—Motion to set aside an execution and levy. The motion is not made by the execution defendant.

63	229
196	219
63	229
149	568
152	438
63	229
160	486

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He makes no objection to the execution or levy. The motion is made by the plaintiffs in another execution against the same defendant, with a view to subjecting the property levied on to the payment of their execution. It is a controversy between execution plaintiffs. The motion is not for the application of proceeds, but for a judgment that the execution sought to be set aside was void.

The plaintiffs, in this motion, state, that, on the 2d day of December, 1875, they obtained a judgment for over two hundred dollars against one George B. Roach, and caused an execution to issue thereon; but that the constable, to whom said execution was delivered, could not levy the same because the personal property of the execution defendant had been taken possession of by the sheriff, on an execution issued against said defendant Roach at an earlier hour of the same day than was that to the constable, on a judgment rendered by the circuit court of said county of Tippecanoe.

The objections to the execution from the circuit court to the sheriff are thus stated in the motion:

“That said judgment, in favor of said Carnahan and Murphy, against said Roach, was recovered on the morning of said 2d day of December, 1875; that, immediately thereafter, on the 2d day of December aforesaid, said Carnahan and Murphy caused execution to issue on the said judgment against said Roach, and to be placed in the hands of said Christian M. Nicely, the sheriff of Tippecanoe county, State of Indiana; that said sheriff levied said execution, on said 2d day of December, 1875, on a certain stock of boots and shoes, the personal goods and chattels of said Roach, in the store of said Roach in the city of Lafayette, Indiana, of great value, to wit, six hundred and two dollars; that said stock of boots and shoes comprised all the personal estate of said Roach subject to execution, and in-

cludes the same personal chattels of said Roach which have been levied upon by the constable aforesaid, on the execution issued as aforesaid, in favor of said petitioners against the said Roach; that said sheriff claims that the levy of his said execution was made prior to the levy of the execution in favor of your petitioners by the constable aforesaid; that said goods and chattels are now in the possession of said sheriff, and that he will proceed to advertise and sell the same, unless prevented therefrom by the interposition of this court; and your petitioners say, that the said execution in favor of said Carnahan and Murphy, now in the hands of said Nicely, sheriff aforesaid, was improvidently issued, and is void, for the following causes, to wit:

“1. That the same was issued on the said 2d day of December, 1875, before the clerk of said Tippecanoe Circuit Court had drawn up the proceedings of said court for said day, before the same had been publicly read in open court, and before the proceedings of said court had been duly signed by the judge thereof for said day.

“2. That the said execution was issued in favor of said Carnahan and Murphy, against said Roach, before their said judgment against Roach had been publicly read in open court and signed by the judge thereof.

“3. That said judgment, in favor of said Carnahan and Murphy, was signed by the judge of said Tippecanoe Circuit Court, and said execution issued thereon, before said judgment had been publicly read in open court, as the law directs.

“And your petitioners further say, that the levy of the execution aforesaid, in favor of said Carnahan and Murphy, against said Roach, is illegal and void for the causes following, to wit: That the said levy was made by the sheriff as aforesaid, the said execution issued, and the said judgment signed by the judge of the said Tippecanoe Circuit Court, before

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said judgment had been publicly read in open court, as the law directs. Wherefore your petitioners pray that said execution may be set aside, and said levy vacated," etc.

It is admitted in the motion, that a valid and accurate judgment was recovered by Carnahan and Murphy, against Roach, on the morning of the 2d day of December, 1875. It is not denied that said judgment was duly recorded, nor that it had been read and signed by the court, before the execution issued; but the complaint is, that it had not been publicly read and signed in open court, and it is insisted, that, for this reason, the execution was void.

A demurrer was sustained to the motion, and judgment overruling it rendered.

Error is assigned upon this action of the court.

The following is a section of the circuit court act, 2 R. S. 1876, p. 6, which was approved June 1st, 1852:

"SEC. 22. It shall be the duty of the clerk of the circuit court to draw up each day's proceedings at full length, and the same shall be publicly read in open court, after which they shall be signed by the judge; and no process shall issue on any judgment or decree of the court until it shall have been so read and signed."

The code of procedure act was approved June 18th, 1852, the 405th section of which is as follows, 2 R. S. 1876, p. 197:

"Writs of execution, as now used for the enforcement of judgment, are modified in conformity to this chapter [article], and any party in whose favor judgment has heretofore been, or may hereafter be rendered, may, at any time within ten years after the entry of judgment, proceed to enforce the same, as prescribed in this chapter [article]."

This section is as originally enacted, except that ten years have been substituted for five, as the time within which execution may issue after judgment. It is contended that this

section, being later than section 22 of the circuit court act, above quoted, repealed that section, and *Carpenter v. Vanscoten*, 20 Ind. 50, somewhat favors this proposition; but it will not be necessary for us, here, to express an opinion upon it.

We are satisfied said section 22, relied upon by appellants, is directory, and that the execution issued in this case, while it may have been irregular, was not void. We say it may have been irregular. The facts as to how, when or where the judgment was read, are not stated in the motion, but simply a conclusion of law. The presumption is, that the judgment was duly read and signed.

In *Nave v. King*, 27 Ind. 356, it is said:

“In *The People v. Allen*, 6 Wend. 486, the court, as we think, correctly laid down the general rule to be, that where the statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory, unless the nature of the act to be performed, or the language used by the Legislature, shows that the designation of time was intended as a limitation of the power of the officer.”

The cases bearing upon the question of the validity of the execution, in the case before us, are quite numerous, and, as we think, they establish two propositions:

1. That the execution may have been irregular, but not void; and,

2. That no one not a party to such execution can object to it.

The cases are collected in *Freeman on Executions*, section 25, to which work we refer for a statement of them. The author says:

“An execution issued in Massachusetts, in violation of the statute directing that ‘no execution shall be issued within twenty-four hours after the entry of the judgment,’ was adjudged to be void, and the title derived therefrom

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was disregarded. *Penniman v. Cole*, 8 Met. 496. In the same State, a justice of the peace, who issued execution within less than twenty-four hours after the rendition of judgment, was held liable therefor in an action of trespass. *Briggs v. Wardwell*, 10 Mass. 356. But a very decided preponderance of the authorities is against the first decision above referred to, and in favor of the proposition that the premature issuing of an execution is an irregularity merely. The execution is erroneous, but, like an erroneous judgment, it must be respected, and may be enforced, until it is vacated in some manner prescribed by law. No one but the defendant can complain of it; and even he can not do so in any collateral proceeding." He cites *Wilkinson's Appeal*, 65 Pa. State, 190; *Lynch v. Kelly*, 41 Cal. 232; *Blaine v. The Ship Charles Carter*, 4 Cranch, 333; *Carson v. Walker*, 16 Mo. 85; *Bacon v. Cropsey*, 7 N. Y. 199. See, also, *Mariner v. Coon*, 16 Wis. 490; *Jones v. Davis*, 24 Wis. 229; *Doe v. Harter*, 2 Ind. 252; *Willson v. Binford*, 54 Ind. 569.

The cases cited in Freeman, *supra*, support the text.

We may properly call attention to the fact that section 22 of the circuit court act contains two clauses: the first directing each day's proceedings to be drawn up, read in open court and signed by the judge; the second declaring that no process (execution) shall issue on any judgment or decree till it has been so read and signed, contemplating that single judgments or decrees may be read and signed separately from the whole proceedings, so that execution may issue thereon. *Hunter v. The Burnsville Turnpike Co.*, 56 Ind. 213.

The judgment is affirmed, with costs.

Opinion filed at May term, 1878.

Petition for a rehearing overruled at November term, 1878.

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ROBINIUS v. THE STATE.

LIQUOR LAW.—Sale to Minor.—A sale of intoxicating liquor to a minor, made by the seller in the reasonable and honest belief that such minor is of full age, is not a violation of the liquor law.

SAME.—Personal Appearance of Minor.—The court has no right to take into account, in determining the guilt or innocence of such seller, the personal appearance of such minor, as to age.

From the Marion Criminal Circuit Court.

D. V. Burns and *C. S. Denny*, for appellant.

T. W. Woollen, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

Howk, C. J.—In this case the indictment charged, in substance, that, on the 5th day of September, 1878, at Marion county, Indiana, the appellant unlawfully sold to Edward Geisendorff, who was then and there a person under the age of twenty-one years, one pint of intoxicating liquor, at and for the price of ten cents, contrary to the form of the statute, etc.

On arraignment the appellant pleaded, that he was not guilty of the charge in the indictment.

The cause was tried by the court, without a jury, and a finding was made, that the appellant was guilty as charged, and he was assessed with a fine and the costs of the prosecution.

The appellant's motion for a new trial was overruled, and he excepted to this decision, and judgment was rendered by the court on its finding.

In this court the appellant has assigned as error the decision of the court below, in overruling his motion for a new trial. In this motion the appellant assigned the following causes for such new trial:

1. The finding of the court was contrary to the evidence; and,
2. The court erred in taking into consideration the

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appearance of the witness, Edward Geisendorff, in determining the question of the guilt or innocence of the appellant.

The evidence is properly in the record. On the part of the State, Edward Geisendorff testified, that he was seventeen years of age, and that he only knew his age from what his mother told him; that he knew the appellant, and had been given the money, at the time named in the indictment, to go to the appellant's saloon and get a drink; that the person who gave him the money declined to go into the saloon with him, and he then got another man to go in with him; that he bought, from the appellant's barkeeper, two glasses of lager beer, which was intoxicating liquor, and which he paid for, and he and his companion drank the same, in the appellant's presence; and that the man who gave him the money said that he would like to get an indictment against the appellant.

The man who drank with Geisendorff, in the appellant's saloon, testified that Geisendorff bought and paid for two glasses of lager beer, which they drank in the appellant's saloon, and that the beer was bought from, and the money paid to, the appellant's bartender. The venue was proved, and the State rested.

The appellant and his bartender testified, that they remembered the transaction about which the State's witnesses had testified; that, when Geisendorff called for the glasses of beer, the bartender asked him if he was of age, and he answered that he was, and that his companion had said that he would swear that Geisendorff was of age. The appellant and his bartender further testified, that they believed Geisendorff was of age, and, if they had not believed so, they would not have sold to him.

In rebuttal, Geisendorff denied that he had said to the appellant, or his bartender, any thing about his age; and Geisendorff's companion denied that he had said any thing,

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or that he had heard any thing said, about the age of Geisendorff.

This was the substance of the evidence introduced on the trial; and it will be seen that it left room for a reasonable doubt as to the appellant's guilt of the offence for which he was indicted; for, if Geisendorff represented himself to be of full age, and it appeared that the appellant had used reasonable caution in making the sale to him, and had honestly believed, and had reason to believe, that he was then of full age, it would hardly be claimed that the appellant, in making such sale, had committed an indictable offence, for which he ought to be punished, even if it were shown that Geisendorff was in fact under the age of twenty-one years.

It was further shown, however, by the bill of exceptions, that "The court, without being requested thereto by the counsel for the State, or by any one else, having personally inspected the appearance of the witness, Edward Geisendorff, who was present in court and testified as a witness, took his youthful appearance into consideration, in determining the question of the defendant's guilt or innocence, to which the said defendant at the time objected and excepted."

This action of the court was assigned by the appellant as a cause for a new trial, in his motion therefor, and we think it was well assigned. The question presented thereby is not a new question in this court. Substantially the same question was decided in the case of *Stephenson v. The State*, 28 Ind. 272, and again in the more recent case of *Thinger v. The State*, 53 Ind. 251.

In these cases it was held, in substance, and we think correctly, that the personal appearance of a party or witness can not be considered by court or jury as evidence, in determining the question of the age of such party or witness. The cases cited are decisive of the case now before us.

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The court erred, we think, in overruling the motion for a new trial.

The judgment is reversed, and the cause remanded for a new trial.

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ÆTNA INSURANCE CO. v. MEYERS.

FIRE INSURANCE.—Policy.—*Stipulation as to Loss during Non-occupancy of Premises Insured.—Notice.*—A policy of insurance against loss by fire, issued upon a house occupied by a tenant, provided, that, if the house “shall, at any time * during the continuance of this insurance, become unoccupied, * then and * thenceforth, so long as the same shall be so unoccupied, these presents shall cease and be of no force or effect.”

Held, in an action on such policy, to recover for a loss by fire occurring at a time when the house was unoccupied, that the plaintiff can not recover.

Held, also, that notice of such non-occupancy is not required.

Held, also, that, by such non-occupancy, the policy became, not wholly void, but simply inoperative until the house should be reoccupied.

From the Warrick Circuit Court.

I. S. Moore, for appellant.

A. Gilchrist and C. H. Butterfield, for appellee.

PERKINS, J.—Suit upon a policy of insurance on a dwelling-house, running one year. A total loss was averred.

A demurrer to the complaint was overruled, and exception entered.

Answer in two paragraphs :

1. General denial ;

2. That the policy contained the following :

“It is hereby agreed and declared to be the true intent and meaning of the parties hereto, that, in case the above mentioned building shall, at any time after the making and during the continuance of this insurance, become unoccupied, * * * or be altered or repaired, or have carpenter or mechanical work done thereon, unless herein

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otherwise specially provided for, or hereafter agreed by the company in writing and added or endorsed on this policy, then and from thenceforth, so long as the same shall be so unoccupied, * * * * these presents shall cease and be of no force or effect;" and "that the house covered by the policy was unoccupied at the time it was burned."

A demurrer to the second paragraph was overruled, and exception reserved. Reply. Jury trial.

Verdict for the plaintiff, the appellee in this court.

It appeared by the evidence, that the house was occupied by tenants when it was insured; that the tenants failed to pay rent when due, and the landlord took steps to remove them. Meyers, the owner, testified: "No one lived in the house at the time of the fire. The tenants left on Friday or Saturday. The building was burned the next Tuesday. The building was used as a tenant house. It was a double tenement, usually occupied by two families. I put the tenants out because they would not pay rent. I had engaged it to S. C. Carney, as soon as I could get them out and have the building repaired. A little plastering and whitewashing was all that was needed. Carney was living in my house across the street, and was to go into it for a year, as soon as I could get tenants out, and get Fred Meyers to fix the house. The tenant was to move in as soon as it was repaired."

No notice of the fact that the house had become unoccupied was required.

The court gave the following instruction, which was accepted to by the appellant:

"The condition in the policy as to occupancy should have a liberal construction; and, if a house is rented and occupied by tenants, a few days' time between the outgoing and incoming tenant, being a reasonable time to make the change, would not make the policy void in case of loss."

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A motion for a new trial was made upon the following grounds:

1. Verdict contrary to the evidence and the law;
2. The court erred in giving the instruction above copied; and,
3. Excessive damages.

The motion was overruled, and exception entered.

The questions arising in the cause and discussed by counsel are these:

1. Did the court err in giving the instruction copied above?

2. Did the jury give excessive damages?

The policy, in this case, was for a year, upon a house occupied, at the time the policy was issued, by tenants. It did not prohibit a change of tenants, but provided, not that the policy should become void on the house becoming "unoccupied," but that the policy should cease to operate so long as the non-occupancy should continue, and revive upon the house being reoccupied.

In the case at bar, the house was unoccupied at the time it was burned; it had been unoccupied for about four days; some of the witnesses make the time longer; and no definite time when it was to be occupied was fixed. It was to be occupied, as soon as it should be repaired, by Fred Meyers. How soon that might happen, is not shown. As matter of fact, as we have said, the house was unoccupied when it was burned. *Keith v. Quincy Mutual Fire Ins. Co.*, 10 Allen, 228. By its terms the company, the appellant, was not liable on the policy sued upon. The policy was a contract. What reason appears for giving it an operation, by construction, different from that which its terms require? It seems to us that the literal meaning expresses just what the parties intended. Here, a tenant house is insured for a year. A change of tenants, during the time, is not prohibited, and

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might naturally be expected; short intervals in which the property would be vacant might naturally occur. The contract (the policy) provided, that, when they did occur, the policy should not be operative during their existence. The rate of insurance, we may presume, was less than it would otherwise have been, in consequence of this provision. This, it seems to us, is the most reasonable view to be taken of the clause in question in the policy.

If the construction we have placed upon the policy be correct, the instruction copied, which was given by the court and excepted to, was erroneous. The policy was not made void by non-occupancy for any length of time; its operation, as a protection from loss, was suspended only during such non-occupancy. The insured took the risk of loss himself, during such period, a fact which would naturally stimulate him to promptness in procuring a tenant on the house becoming vacant.

We need not criticise the instruction in other respects. What we have said shows, that in our judgment it was erroneous. The case of *The Aurora, etc., Ins. Co. v. Kranich*, 36 Mich. 289, is one in which facts appeared authorizing a construction variant from the plain literal meaning of the language of the policy. In that case the terms of the policy might make it void at its issuance and the reception of the money by the company, and it is decided, that "The provision in a policy that 'if at any time during the continuance of this policy * * the insured property * * shall become vacant or unoccupied,' the insurer shall be absolved from all liability, is held to have no application to the case of buildings that are vacant at the time the policy is issued, the insurer having notice of the fact." Here was a case for construction.

In the above case, the fact of becoming vacant rendered the policy from that time void for the whole of the remaining period it was, by its terms, to run. In the case now

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before us, there is no forfeiture of the policy. Its operation is suspended merely while the house is vacant. It becomes again operative on its reoccupancy. It seems to us, that it was intended by the parties that the policy should mean what it said, and apply to short intervals of non-occupancy.

The cases cited by the appellee are not in point.

The judgment is reversed, with costs, and the cause remanded for proceedings in accordance with this opinion.

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LIQUOR LAW.—Sale Without License.—Indictment.—Supreme Court.—Practice.—An indictment for retailing intoxicating liquors without license charged the defendant with having made a certain sale, without “then and there having a license from the board of commissioners” of the county wherein the sale was made.

Held, that the indictment is insufficient.

Held, also, that the sufficiency of an indictment may be questioned, for the first time, in the Supreme Court, on appeal.

From the Benton Circuit Court.

M. W. Walker, for appellant.

T. W. Woollen, Attorney General, for the State.

NIBLACK, J.—This was a prosecution for unlawfully retailing intoxicating liquor.

The indictment charged, that John O'Brien, the appellant, on the 28th day of August, 1877, at the county of Benton, sold to one John Gillespy one half pint of intoxicating liquor, to be drank in his, the said O'Brien's, house, without “then and there having a license from the board of commissioners of Benton county to sell intoxicating liquors in a less quantity than a quart at a time, with the

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privilege of allowing the same to be drank on the premises where sold."

Upon a plea of not guilty, there was a trial by a jury. A verdict was returned finding the appellant guilty as charged in the indictment, and assessing his fine at twenty dollars; and a judgment of conviction was rendered upon the verdict.

Errors are assigned here, raising the question of the sufficiency of the indictment.

The indictment in the case now before us was in all respects similar to the one presented to us in the case of *Meier v. The State*, 57 Ind. 386, which was held to be bad because the allegation of the appellant's want of a license from the board of commissioners of Benton county was not equivalent to an averment, that he was not licensed by any competent authority, which averment is necessary in an indictment for retailing intoxicating liquor without a license, as the circuit court may, in certain cases, upon appeal, order a license to be granted; and, upon the authority of that case, the indictment in the case at bar must be held to have been insufficient to support a conviction upon it. See, also, *Henderson v. The State*, 60 Ind. 296.

In this latter case we held, amongst other things, that the sufficiency of an indictment might be attacked for the first time in this court, and to that decision we still adhere.

The judgment is reversed, and the cause remanded, with instructions to quash the indictment.

SMITH ET AL. v. PETERSON ET UX.

HUSBAND AND WIFE.—*Goods Purchased by, Wife in another State.—Common Law.—Statute of Foreign State.—Presumption.—Rights of Property.—Exe-*

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cution.—Certain household goods, purchased by a married woman, with her own means, and used in her husband's household, in another State, were removed by them into this State, where they were seized upon an execution against a third person.

Held, in an action by the wife and her husband, to try the rights of property, that it is presumed, the contrary not being alleged and proved, that the common-law rule, vesting such goods in the husband, prevailed in such other State, and that, for want of title in herself, she can not recover.

From the Clarke Circuit Court.

P. H. Jewett and C. L. Jewett, for appellants.

J. B. Merriwether, for appellees.

BIDDLE, J.—Action to try the right of property. The goods, consisting of household furniture, were levied on by Schell, as constable, by virtue of a writ of restitution issued by the justice of the peace, at the suit of Jane Smith, as the property of Thomas R. Lord and his wife, and claimed as the property of Jane Peterson, who brings this action, joining Peter Peterson, her husband, in the complaint. No question is made upon the pleadings. The claimant failed before the justice of the peace, and judgment was rendered against her. She appealed to the circuit court, wherein, upon a trial by the court, a finding was had in her favor.

By a motion for a new trial, two questions are brought here for our decision: Is the finding sustained by the evidence? Is the decision contrary to law?

The evidence shows that Jane Peterson is, and has been for many years, the wife of Peter Peterson; that she purchased the goods in controversy, during coverture, in the State of Kentucky, by means furnished to her by her brother; that the property was received into the household of the husband, in the State of Kentucky, and used for the common benefit of the family: that some years since they removed into the State of Indiana, from the State of Kentucky, bringing the goods with them, where they were levied on, as stated in the complaint; that they

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have lived together as husband and wife ever since their marriage, in 1843.

There is no evidence in the record tending to contradict the above facts; we have, therefore, no question concerning the conflict of evidence to decide. The question is, does that state of facts show the property of the goods to be in Jane Smith? By the common law they would be the goods of the husband. No statute or law of Kentucky changing the common law was either alleged or proved at the trial, and we can not judicially know that there is any such statute or law in Kentucky; we must, therefore, presume that the common law, as to the rights of property between husband and wife, is yet in force in Kentucky. As, by this law, the goods belonged to the husband while in Kentucky, his removal to this State, bringing them with him, did not divest his right in the goods. *Lichtenberger v. Graham*, 50 Ind. 288. As Jane Peterson has not shown herself to be the owner of the property, and entitled to its possession, she is not entitled to judgment in her favor. *Philbrick v. Goodwin*, 7 Blackf. 18.

The judgment is reversed, at the costs of Peter Peterson; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings according to this opinion.

THE TELL CITY FURNITURE COMPANY v. NEES.

CORPORATION.—*Articles of Association.*—*Stipulation as to Payment of Wages.*

—*Interest.*—A stipulation in the articles of association of a corporation organized under the laws of this State, providing that each member of the association “shall receive his wages in cash, if demanded, and the treasury will allow it,” and that a specified rate of interest shall be allowed him on a “balance” of a certain amount due him, is binding upon each of such members.

SAME.—*Words and Phrases.*—The term “wages,” as used in such stipulation,

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reasonably includes wages due to a member for work and labor performed by him for the corporation.

SAME.—Demand.—Recovery for such wages can not be had by a member of such corporation unless he first make demand therefor, and the condition of the treasury is such that payment can be made.

SAME.—Plea in Abatement of Action.—An answer setting out such stipulation, and averring that the plaintiff was and is a member of the corporation, that the matter in suit is wages for labor performed by him, that he had made no demand, and that the condition of the treasury is such that payment can not be made, is sufficient on demurrer.

SAME.—Verification.—Demurrer.—The fact that such answer is not sworn to is not presented by a demurrer thereto.

From the Perry Circuit Court.

C. A. DeBruler and *E. R. Hatfield*, for appellant.

S. Joseph, Jr., and *S. B. Hatfield*, for appellee.

PERKINS, J.—Suit on an account for work and labor, etc. Demurrer to the complaint, for want of sufficient facts, overruled, and exception entered.

The defendant below, the appellant here, answered as follows:

“The said defendant, for answer to the plaintiff’s complaint herein, says, that the plaintiff ought not to maintain this action, because the defendant is a corporation organized and existing under the laws of the State of Indiana, under articles of association; that the said plaintiff was one of the original incorporators, and duly signed and executed said articles of association, and that he has ever since been, and now is, a member and stockholder of said corporation, owning and holding forty shares of fifty dollars each, amounting to two thousand dollars, of the stock of said corporation; that, by the terms of the 7th section of said articles of association, a copy of which is filed herewith, as a part hereof, it is provided, that every member shall receive his wages in cash, if demanded, and the treasury will allow it; and the defendant expressly avers, that all of the indebtedness set forth in plaintiff’s complaint is for wages for work and labor performed by

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plaintiff as a member and stockholder of said corporation, under said articles of association, in and about the business of the defendant; that the treasurer of the defendant, from time to time, pays to its employees and laborers their wages, most of whom are members and stockholders of said corporation, such sums of money as may be in the treasury of defendant, paying to each employee his *pro rata* part of all the moneys in the treasury; that, owing to the pressure of the times, there is not now, nor was there at the commencement of this action, nor for a long time before, any money in the treasury of the defendant to pay plaintiff or the other stockholders and members his and their claims for wages, and for that reason alone the treasurer has for some months failed to pay this plaintiff and the other members, though said corporation is solvent and able to pay all its indebtedness; that the money to pay said wages must be obtained and received from the sale of furniture manufactured by the company, that being its exclusive business; that the corporation has now, and for eight months past has had, a large amount of first class furniture in store, and is still manufacturing large amounts, and is now, and has been for many months, making every effort to sell said furniture in different parts of the country; that defendant has a trade for the sale of furniture of its manufacture in all the States bordering on the Ohio and Mississippi rivers, from Tell City, Indiana, to New Orleans, Louisiana, extending into the State of Texas, and various other parts, and will be able, with the revival of business in the Southern States, to sell sufficient furniture now manufactured to pay off all its debts; that the plaintiff is unpaid for the reason expressed in said 7th section of the articles of association, that the "treasury would not allow it," which said section is still in full force and effect, and was signed by all the stockholders, being eighteen in number, including the plaintiff.

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Wherefore defendant says, it is not now liable to pay said claim for wages, and therefore prays judgment for costs, and all proper relief."

COPY OF THE SEVENTH SECTION OF THE ARTICLES OF ASSOCIATION.

"Section 7. Every member shall receive his wages in cash, if demanded, and the treasury will allow it. If a member has a balance of one hundred dollars, he shall receive six per cent. interest for the same, from date."

(Signed),

"JOHN A. HARRER,
"HENRI AHLF,
"PHILIP GRIMMERSIN,
"ERNEST NEES,
"CHARLES REICH,

"And thirteen others."

Demurrer to this paragraph of answer, for want of facts, was sustained, and exception taken.

The defendant refused to answer further, and the court, having heard the proof adduced by the plaintiff, rendered judgment in his favor, for the amount of the account sued upon, and costs.

The defendant appealed to this court, and assigned for error the sustaining of the demurrer of the appellee to the appellant's answer.

Parties who voluntarily form themselves into business corporations, under statutes, may bind themselves by reasonable provisions in their articles of association or by-laws, the statutes not prohibiting it. Field Corporations, sec. 294.

They must not be in violation of the constitution and laws of the State, nor of the particular law under which the association is organized. The provision in the articles of organization of the appellant, that "Every member shall receive his wages in cash, if demanded, and the treasury

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will allow it," and that, when the balance due a member is one hundred dollars, he shall receive six per cent. interest thereon, is not in violation of the common law, as to the power to make contracts. Contracts between individuals, to pay when a party is able, are valid. 1 Daniel Negotiable Instruments, 34; *Nunez v. Dautel*, 19 Wal. 560; *Veasey v. Recres*, 6 Ind. 406; *Cox v. Wallace*, 5 Blackf. 199; *Barnett v. Bullett*, 11 Ind. 310.

The above cases differ somewhat, in their facts, from that at bar. In it, payment is to be made upon the existence of two specified facts, viz., cash in the treasury of the corporation, applicable to the payment of the claim of a member, and a demand, by the member, of payment out of such cash to him, on a just claim against the corporation.

We have an authority much in point in the case before us. In *Toram v. The Howard, etc., Association*, 4 Pa. State, 519, it is decided, as applicable to that case, which is identical in principle with the one in judgment, that:

"The corporation is bound by the fundamental articles, to pay only when it is in funds; and it has determined that it is not. As the plaintiff, in becoming a corporator, assented to its acts prospectively to be done, according to the charter of its constitution, he is concluded by the decision of his own forum."

As, in the present case, no decision of any corporate forum appears, we hold that it may be shown, on the trial of this cause, that the condition of the treasury would have allowed cash payment of the claim sued on, the question being raised by issue. Counsel for the appellee do not insist that the provision in question, in the charter, is void, but they insist that the allegations of the answer do not show that the plaintiff's claim is embraced by it. We think they do; and, such being the fact, the answer also shows conditions precedent to the plaintiff's right to

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recover, which have not been fulfilled. *The Board, etc., v. Mason*, 9 Ind. 97.

It shows that the plaintiff performed the work, to recover for which he sues, under a provision of the charter, as we may call it, amounting to a contract, as to compensation for it, that he was only to be paid in cash on special demand therefor, and when the treasury of the corporation was in cash funds wherewith to pay. When it was not in cash funds, he would necessarily give credit to the corporation, receiving interest on his dues according to the articles of organization, or take his pay in manufactured or other specific articles. It could only be known to the corporation that the plaintiff wished for cash by a demand.

It is objected to the answer, that it contained matter in abatement, and was not sworn to. It was objected to only by a demurrer for want of facts.

Judgment reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

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CRIMINAL LAW.—*Practice.*—*New Trial.*—*Assignment of Error.*—*Supreme Court.*—*Instructions.*—*Evidence.*—Error in giving or refusing instructions to the jury, or in admitting or excluding evidence, is cause for a new trial, but can not be properly assigned as error on appeal to the Supreme Court.

SAME.—*Betting on Election.*—*Indictment.*—An indictment, charging the defendant with losing money by betting on an election, which alleges the purchase, by the defendant, of a chattel, at its alleged value, to be paid for, at that price, only in the event of the election of a candidate named, to a particular office, at a certain election, is insufficient

From the Jennings Circuit Court.

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T. C. Batchelor, for appellant.

T. W. Woollen, Attorney General, for the State.

Howk, C. J.—The indictment in this case charged, in substance, that the appellant, on the 10th day of October, 1876, at Jennings county, Indiana, “did then and there unlawfully lose to John B. Reiley ten dollars, of the value of ten dollars, by then and there unlawfully betting and wagering one gold finger-ring with the said John B. Reiley, of the value of ten dollars, as follows, to wit: The said Elmer Wagner then and there bought of the said John B. Reiley one gold finger-ring, of the value of ten dollars, to be paid for at that price, when James D. Williams should be elected Governor of the State of Indiana, otherwise not to be paid for at all, which finger-ring was then and there delivered to the said Elmer Wagner; the said event to be determined by the result of an election held on the 10th day of October, A. D. 1876, in the said State of Indiana, for the election of a Governor for said State, and for which office the said James D. Williams was then and there a candidate.”

The appellant moved the court to quash the indictment, which motion was overruled, and to this ruling he excepted. He waived an arraignment and, for plea to the indictment said that he was not guilty as therein charged. The issues joined were tried by a jury, and a verdict was returned, finding the appellant guilty as charged, and assessing his fine in the sum of ten dollars. The appellant's written motion for a new trial was overruled, and to this ruling he excepted; and his motion in arrest of judgment having been overruled, and his exception saved to this ruling, judgment was rendered on the verdict.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court:

1. In overruling his motion to quash the indictment;
2. In giving the jury certain specified instructions;

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3. In refusing to give certain specified instructions at the appellant's request;

4. In overruling his motion for a new trial;

5. In overruling his motion in arrest of judgment;

6. In permitting a certain witness to answer a certain question; and,

7. In permitting the same witness to answer a certain other question.

The second, third, six and seventh of these alleged errors are merely causes for a new trial, and are improperly assigned, in this court, as independent errors.

The controlling questions for decision in this case, as it seems to us, arise on the first and fifth of the errors complained of,—the overruling of the appellant's motions to quash the indictment, and in arrest of judgment. These two errors, the first and fifth, alike call in question the sufficiency of the indictment.

We have two statutes in this State, which were evidently intended to prevent betting or wagering upon the result of an election, by making the same a misdemeanor or public offence, and prescribing proper punishment therefor. These two statutes were both enacted at the same session of the Legislature, in the year 1857; and, as neither of the statutes contained an emergency clause or section, they became laws on the same day, to wit, on the 24th day of August, 1857. While the two statutes were no doubt enacted for the same general purpose, yet the phraseology of each is widely different from that of the other of the said statutes. One of these statutes is the amended section 28 of the act defining misdemeanors and prescribing punishment therefor; and the other is an act entitled "An act to prevent betting on elections, and providing punishment for the same." They are both to be found on page 468, 2 R. S. 1876.

From the language used in the indictment, in the case

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at bar, it is very clear, we think, that it was intended to charge the appellant, in and by said indictment, with the commission of the offence which is defined in the amended section 28 of the misdemeanor act. This section reads as follows:

“Sec. 28. Every person who shall by playing or betting at or upon any game or wager, or upon the result of any election, either lose or win any article of value, shall be fined in any sum not less than the value of the article so lost or won, nor exceeding twice the value thereof, and any one of the persons so betting or playing may be compelled to testify against the others therein concerned.”

Supra.

It is charged in the indictment, in the case now before us, that the appellant “did then and there unlawfully lose to John B. Reiley ten dollars.” But, upon the facts stated in the indictment, in describing the appellant’s bet or wager with John B. Reiley, we confess that we can not see how it could be possible for the appellant to lose ten dollars, or any other sum, upon the result of that bet or wager. He might possibly have won the finger-ring upon the result of the election; but, in no event, could he lose any sum whatever upon the result of the bet or wager described in the indictment. He bought and actually received from Reiley a finger-ring of the value of ten dollars, and at the agreed price of ten dollars. It was agreed between him and Reiley, that, if James D. Williams should be elected Governor of Indiana, at the October election, 1876, he would pay Reiley the price and value of the ring; but, if Williams should not be elected Governor, at said election, he should not be required to pay any price for the ring. This was the bet or wager described in the indictment; and it is a clear proposition, too plain for argument, as it seems to us, that whatever might have been the result of such bet or wager, it was impossible for the appellant to

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lose by means of such result. He had bought a finger-ring, at its actual value, but was only to pay for it on the happening of an uncertain event. If the event happened, he lost nothing, but would only be required to pay the fair price and value of an article he had bought and received; if the event did not happen, he might win, but certainly he could not lose.

In our opinion, the indictment showed upon its face that the appellant was not and could not be guilty of the offence intended and attempted to be charged against him. The facts stated in the indictment did not constitute the public offence wherewith it was intended and attempted to charge the appellant.

For this reason, we think the appellant's motion to quash the indictment ought to have been sustained. 2 R. S. 1876, p. 399, sec. 101.

The judgment is reversed, and the cause is remanded, with instructions to sustain the appellant's motion to quash the indictment.

PATE ET AL. v. THE FIRST NATIONAL BANK OF AURORA.

PROMISSORY NOTE PAYABLE IN BANK.—Foreclosure of Mortgage.—Misjoinder of Actions or Parties.—Supreme Court.—Complaint by an assignee, against the maker and assignor, upon a promissory note payable in bank, and to foreclose a mortgage executed by the assignor, to the assignee, to secure payment of the note.

Held, that there was no misjoinder of parties defendants, nor of causes of action.

Held, also, that the Supreme Court will not reverse a judgment for misjoinder of causes of action.

SAME.—Non Est Factum.—Burden of Proof.—Open and Close.—Where the execution of a promissory note in suit is denied under oath, the burden of proof is on the plaintiff, and he has the right to the open and close.

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SAME.—Putting Note in Evidence.—The note in such case should be admitted in evidence, on behalf of the plaintiff, upon his introducing any evidence however slight, of its execution ; and the defendant has no right to introduce evidence denying its execution, until the plaintiff has concluded his evidence in chief.

SAME.—Rebuttal.—The plaintiff in such case has the right to the close, upon the conclusion of the defendant's evidence, though his rebutting evidence may include a portion of his evidence already given in chief.

SAME.—Rebutting Evidence.—The defendant in such case can not complain of the introduction, by the plaintiff, of new matter, in rebuttal, where he himself is, in turn, allowed to rebut such new matter.

SAME.—Putting Mortgage in Evidence.—In an action by an assignee, against the maker and assignor, on a promissory note, and to foreclose a mortgage executed by the assignor, to secure payment of the note, the plaintiff has a right to introduce the mortgage in evidence, though the mortgagor has made default, and the maker only, under a denial of the execution of the note, is contesting the action.

SAME.—Principal and Agent.—Execution of Promissory Note by one, in Name of another.—Instruction.—In an action against A., on a promissory note executed by B. in the name of himself and A., in renewal of a prior joint note executed by them, the court instructed the jury, that if from the evidence, they believed that A. and B. had been carrying the note alleged to have been renewed, and that A. had informed the payee's agent, that, if it became necessary to renew the note, B. had authority to execute the renewal in the name of both A. and B., and that the note in suit had been so executed prior to any revocation of such authority, A. was bound thereby.

Held, on evidence tending to show such a state of facts, that the instruction is correct.

SAME.—Harmless Refusal of Instruction.—Where the substance of an instruction refused is embraced in one given, such refusal is harmless.

From the Decatur Circuit Court.

E. P. Ferris and W. W. Spencer, for appellants.

H. D. McMullen, R. Gregg, J. A. Parks, A. C. Downey and H. S. Downey, for appellee.

NIBLACK, J.—This was an action by the First National Bank of Aurora, against Michael Geigoldt, James W. Pate and Peter S. Pate, administrator of the estate of John Pate, deceased, on a promissory note, as follows :

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“\$2,000.00.

AURORA, Indiana, Dec. 28th, 1873.

“Four months after date, we promise to pay to the order of Michael Geigoldt two thousand dollars, with interest at ten per cent. per annum after maturity, and attorney’s fees if suit be instituted on this note, value received, without any relief whatever from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment, protest, notice of protest and non-payment of this note. Negotiable and payable at the First National Bank of Aurora.

“JOHN PATE,

“JAMES W. PATE.”

Endorsed: “MICHAEL GEIGOLDT.”

And against the said Michael Geigoldt and Catharine Geigoldt, his wife, to foreclose a mortgage executed by them, to said bank, to secure the payment of said note.

The defendant James W. Pate answered denying the execution of the note under oath, but the other defendants made no defence.

A jury was empanelled to try the issue thus formed by the answer of James W. Pate.

Elam H. Davis, the plaintiff’s cashier, was then introduced as a witness, and testified to the court concerning the execution of the note in suit. His testimony can, we think, be fairly transposed and condensed into a statement, substantially as follows:

“I became cashier of the plaintiff, January 12th, 1869. When I became cashier, there was a note in the bank for \$2,000.00, executed by John Pate. The note sued on was negotiated while I was cashier. John Pate signed James W. Pate’s name to it. James W. Pate told me that John Pate, who was his brother, was authorized to sign his name to the note. The note in suit was in renewal of the other paper that was in bank. The first time there was a renewal after I

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became cashier, John Pate came to the bank and made up a paper, similar to the note in suit, with James W. Pate's name signed to it, and offered it in renewal of the note then in bank. I declined to take the paper thus offered. In a day or two afterward, John Pate and James W. Pate came to the bank together, and a new note was then drawn up and signed by both of them. James then stated to me that he lived seventeen or eighteen miles in the country, and that it was not always convenient for him to be there when the paper they were renewing became due, and that he wished me to understand, that if, at any time when this became due, he was not there, his brother John was authorized to sign his name to a renewal. The paper was renewed from time to time, until the date of the note sued on, and it was signed, with that understanding, by John Pate. Nothing was said as to the time the note was to run at the time of the renewal above referred to."

The defendant James W. Pate then offered himself as a witness, to show to the court, that no such conversation between him and Davis, as that testified to by Davis, had ever occurred, but the court refused to hear the evidence thus offered by the said Pate, and, over his objection, permitted the note in suit to be read to the jury.

The mortgage accompanying the complaint was thereupon read in evidence, over the further objection of the said James W. Pate, and, after some further testimony as to the value of the attorney's fee provided for in the note, the plaintiff rested."

James W. Pate then offered himself as a witness in his own behalf, and testified that he did not sign the note in suit, and never authorized any one else to sign his name to that note; that, at the time of the earlier renewals of the original note, he and his brother John were partners, but that they had ceased to be partners before the note sued on was executed, of which latter fact Davis had been

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informed, and, after some further testimony as to the circumstances under which the last named note was executed, also rested.

Over the objection of the defendant James W. Pate, upon the ground that the evidence was closed, the plaintiff recalled Davis, its cashier, who, in his testimony to the jury, repeated, substantially, what he had said in the first instance to the court, but in a somewhat different order and with some additional details, and, after some further testimony, again rested.

The said James W. Pate again took the stand as a witness in his own behalf, and testified in rebuttal of the evidence introduced as above by the plaintiff, and, by the testimony of other witnesses, in further rebuttal, closed the evidence in the case.

Upon the evidence thus submitted, the jury returned a verdict for the plaintiff, assessing its damages at the amount of the note, with interest and attorney's fees, and, over a motion for a new trial, the court rendered a judgment against the makers and the endorser of the note, for the amount found due upon it, and entered a decree of foreclosure against Michael Geigoldt and his wife, upon the mortgage executed by them to secure the payment of the note.

Errors are assigned in such a way as to raise the several questions, which we proceed to consider.

It is first objected, that there was a misjoinder of causes of action.

The note in suit was governed by the law merchant, and all the parties liable upon it were properly joined in the same action. See act concerning promissory notes, 1 R. S. 1876, pp. 636, 637, secs. 6 and 16.

As the mortgage was but incidental to, and only given to secure the payment of, the note, it was properly foreclosed as a part of the proceedings for the collection of the

note. But, if there had been a misjoinder of causes of action, we could not, for that reason, reverse the judgment. 2 R. S. 1876, p. 59, sec. 52.

It is also objected, that the court erred in hearing evidence from the plaintiff, as to the execution of the note, after the jury were sworn, and in refusing to hear the evidence offered by the said James W. Pate, in defence of the plaintiff's evidence, before the note was read to the jury.

We understand the rule to be, that, where the execution of a note or other similar instrument in writing, sued on, is denied under oath, and no evidence of the authenticity of such note or other instrument is given, it can not be read to the jury, but that, where evidence addressed to the court is adduced, making out a *prima facie* case of the authenticity of such note or other instrument, or reasonably tending, even slightly, to prove the formal execution of it, such evidence is sufficient to entitle such note or other instrument to go to the jury. 2 Greenl. Ev., sec. 294; 2 Phil. Ev., 5th Am. ed., p. 502, top page, 423; *Carter v. Pomeroy*, 30 Ind. 438.

Where there has been sufficient evidence addressed to the court to entitle the note or other instrument to be read in evidence, the court is not to allow the other party to adduce counter proof before it is read to the jury, and thus assume to take the question of the execution of such note or other instrument from the jury. 2 Phil. Ev. *supra*; *Fisher v. Kean*, 1 Watts, 278.

Where a note or other similar instrument, the execution of which is denied under oath, is read to the jury, the question of its authenticity must then be decided by the jury, as in other similar cases.

It is further objected, that the court erred in permitting the plaintiff to introduce evidence to the jury, after the note had been read in evidence, and after the defendant James W. Pate had been heard by the jury and rested.

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The proper course of proceeding, in a case like this, after the note has been read to the jury, has never, so far as we are advised, been definitely ruled upon by this court, and presents a question of practice not well defined by any of the authorities which have fallen under our observation. But, as the plaintiff has the burden of the issue, we are of the opinion that he is entitled to go to the jury with his evidence in chief when the note is read to them, and to close the evidence with his rebutting testimony, or that he may rest when the note is read to the jury, and reserve his right to be further heard in rebuttal of the defendant's testimony, subject, of course, in each case, to the proper discretion of the court in permitting new matter to be replied to, and as to the order in which the evidence of each party may be introduced, as in other similar cases.

In the case at bar, the defendant James W. Pate both opened and closed the evidence, after the note was read to the jury. We see nothing, therefore, in the order in which the evidence went to the jury, of which he, as the defendant in the issue, had any just reason to complain.

It is also further objected, that the court erred in permitting the mortgage filed with the complaint to be read in evidence, as its reading tended to the prejudice of James W. Pate in the trial of the issue formed by him with the plaintiff, but we can not see on what principle this objection can be sustained. It was proper evidence against the defendants Geigoldt and wife, under the averments of the complaint for the foreclosure of such mortgage, and for that reason it was, at all events, rightfully put in evidence as against them. We can not perceive how its reading did James W. Pate any injury, even if its introduction had been unnecessary.

Amongst the instructions given by the court, on its own motion, was the following:

“If you find, from the testimony, that John Pate, in his

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lifetime, and James W. Pate, the defendant, were carrying a two-thousand-dollar note in the First National Bank of Aurora, Indiana, and that James W. Pate informed Mr. Davis, the cashier of the bank, that, if it should become necessary to renew said note, John Pate had authority to sign his, James W.'s, name in the renewal of the same, and James W. did not, prior to the execution of the note in suit, notify the bank that such authority was revoked, and the note in suit was a renewal of said two-thousand-dollar note, and John Pate signed the name of James W. to the same, you will find for the plaintiff as against James W. Pate."

It is contended that this instruction was erroneous, because it authorized the jury to give a broader construction to the authority of John Pate to use the name of James W. Pate than was justified by the evidence, and because it ignored the existence of certain facts tending to show a revocation of John Pate's authority to sign the name of James W. Pate, before he attempted the execution of the note in suit.

We do not, however, see any objection to this instruction. It seems to us to have presented a fair summary of what it was incumbent on the plaintiff to show, under the evidence, to make out a case against James W. Pate, without indicating what any particular portion of the evidence either tended to prove or disprove, regarding what was necessary to be shown. That appears to us to have been entirely proper.

The court refused to give several instructions prayed for by James W. Pate, and complaint is made here of such refusal.

All the material matters embraced in the instructions prayed for and refused were, we think, fully covered by the instructions given by the court. A considerable portion of the series of instructions refused was devoted to a defini-

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tion of the various differences between general and special agents, as defined in the case of *Cruzan v. Smith*, 41 Ind. 288, and other authorities on the subject of agencies, but we do not regard the abstract definitions contended for by counsel as having been calculated to throw any additional light upon the case before us.

The instructions given by the court plainly put it to the jury to say whether, under the evidence, John Pate was authorized to sign the name of James W. Pate to the note sued upon, and that was sufficient to direct the minds of the jury to the real and, indeed, only matter in issue on the trial. Nothing further was required as regards the alleged agency of John Pate in the premises.

Some other questions upon the evidence are discussed by counsel, but they are either subordinate or collateral to some of the questions we have already considered, and we do not deem it necessary to further extend this opinion, by attempting a review of such merely incidental questions.

We see no cause for a reversal of the judgment

The judgment is affirmed, at the costs of the appellant.

THE CORPORATION OF BLUFFTON ET AL. v. SILVER.

TOWN.—Writ of Prohibition.—*Action to Prohibit the Execution of Contract for a Sidewalk.*—A writ of prohibition will not lie, at the suit of a property-holder of an incorporated town, to prevent the execution of a contract let by such town to a contractor, to construct a sidewalk along and upon the real property of the plaintiff.

SAME.—Jurisdiction.—Such proceeding would only be proper, if at all, in such matter, to prevent the making of such contract, for want of jurisdiction.

SAME.—Injunction.—The proper remedy in such case is by injunction.

SAME.—Improving Farming Lands.—The fact that more than twenty acres of such real property is used only for farming purposes is no ground for prohibiting the execution of such contract.

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SAME.—*Intention of Owner to Improve his Property.—Notice.*—The fact that the property-holder was, at the time of the passage of the ordinance requiring its construction, about to construct a sidewalk of a different kind from that required by the ordinance, but of which the town is not alleged to have had notice, is not ground for prohibiting the execution of such contract.

SAME.—*Grade Lines.—Pleading.*—An allegation in the complaint, that the plaintiff "ought not to be required to construct a sidewalk as aforesaid, because the defendant has not established grade lines, or set grade stakes, to guide in the construction of the sidewalk," is not sufficient ground for prohibition or injunction.

SAME.—*Presumption.*—Where it is not denied by the complaint, that such town had adopted all necessary ordinances for the construction of sidewalks as by law she might, the presumption is that such ordinances have been duly adopted.

SAME.—*Necessity.*—The allegation that there was no necessity for the construction of a sidewalk different from that which the plaintiff alleges he was about to construct, is not ground for interfering with the execution of such contract.

From the Wells Circuit Court.

J. S. Dailey, L. Mock and A. N. Martin, for appellants.

N. Burwell and J. J. Todd, for appellee.

PERKINS, J.—On the 5th day of October, 1875, Joseph C. Silver filed a complaint, as follows, for a writ of prohibition :

"Joseph C. Silver, being duly sworn, on his oath says, that he is a citizen and tax-payer of the town of Bluffton, county of Wells, and State of Indiana, and that he is the owner of twenty-three and sixty-five hundredths acres of land adjoining to the south-east part of the original plat of the town of Bluffton, and within the limits of the corporation of said town, as enlarged by amendments made to the act incorporating said town, approved February 15th, 1873. As Main street of said town is extended south from said original plat, the said body of land lies east, and for a distance of five hundred and seventy-one (571) feet along said street, adjoining thereto. Affiant says that there is no person living on said property but himself and fam-

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ily, and that a portion of said land is used by affiant for general farming purposes, and a portion for fruits and garden. Affiant says, that a long while ago, to wit, two years ago, he hauled and deposited along the west side of his said property, adjoining said Main street, as aforesaid, a large quantity of broken stones, taken from the bed of the Wabash river, suitable, in kind and quality, to make a substantial and durable sidewalk, the whole distance of five hundred and seventy-one feet, on said Main street, which said stones, affiant says, he intended, and still intends, if allowed, to break and spread in a suitable manner to make a good sidewalk as aforesaid; said material for said sidewalk, affiant says, is as durable as brick and better and more durable than wood, and in every way suited to the property and comfort and convenience of all persons who would have occasion to use the same. Affiant says, that, notwithstanding the facts as alleged heretofore, the defendant, through her council, did, on the 23d day of April, 1875, enact an ordinance, a copy of which is filed herewith, as affiant believes wrongfully and oppressively, requiring said affiant to construct a sidewalk on the east side of said Main street, along the line of his said property as aforesaid, to be finished by the 1st day of August, 1875, said sidewalk to be located as required by section 4, chapter 18, and of the dimensions required by section 3 of chapter 12 of the revised ordinances of the corporation of Bluffton, said sidewalk to be eight feet and six inches wide. This ordinance to be enforced according to section 2 of chapter 12 of the revised ordinances of the corporation of Bluffton.

“Affiant says he ought not to be required to construct a sidewalk, as aforesaid, for the reason that said defendant has not established grade lines, or set any grade stakes, to guide in the proper construction of said walk, which affiant thinks defendant is in duty bound to do, before requiring him to construct a sidewalk as aforesaid.

“Affiant further says, there is no demand or public necessity at this time for the construction of any other or different walk than the one said affiant has prepared himself to make, as aforesaid, but, notwithstanding all this, the defendant, on the 24th day of September, 1875, over the objection and against the protest of affiant, did proceed to offer for sale, and did sell out, the construction of said walk to Henry Fisher. Said defendant, in making said sale, pretended to do so in pursuance to a notice, a copy of which is attached hereto and made a part hereof, which said notice does not specify the kind of a sidewalk, or the kind of material out of which it shall be constructed, but, since the said sale, said Fisher is now proceeding to construct a sidewalk of plank, and is making it and putting it over and on the stone material prepared for a walk by affiant, as aforesaid, to his great damage and annoyance.

“Affiant asks for a writ prohibiting said defendant and said Fisher from proceeding further in the construction of said walk, and in paying for the same, until the questions herein may be tried.”

A demurrer to the complaint, for want of facts to constitute a cause of action for a writ of prohibition, was overruled, and exception reserved.

An issue was formed, tried, and a perpetual injunction entered upon the completion of said contract by said Fisher.

On appeal to this court, the overruling of the demurrer is assigned as one of the errors committed below.

We will, at this point, consider said assignment of error; for, if it is a true assignment, it will be unnecessary to consider any other question raised in the cause.

The appellee has furnished no brief in support of the decision below. This suit, as we have said, was commenced on the 5th day of October, 1875, to obtain a writ of prohi-

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bition upon the completion of the contract mentioned between said Bluffton and Fisher. And the question presented is, is any legal reason shown in the complaint why that contract should not be executed?

Before proceeding to answer this question, it may be properly observed that no case was made for the issuance of a writ of prohibition. The town council had full jurisdiction in the premises. *The Board of Commissioners of Jasper County v. Spittler*, 13 Ind. 235; 2 Dillon Municipal Corporations, sec. 744. Prohibition, if proper in the case at all, should have been obtained to prevent the making of the contract, for want of jurisdiction, not the execution of it, after it had been made. Injunction was the proper remedy to which to resort, if there was occasion for any. See, as to writs of injunction and prohibition, 2 R. S. 1876, pp. 93 and 298.

The fact that the parcel of land along which the sidewalk was to be constructed contained over twenty acres, and was cultivated for farming purposes, was no ground for restraining the action of the council; it did not make that action illegal. *Ball v. Balfe*, 41 Ind. 221; *The First Presbyterian Church v. The City of Lafayette*, 42 Ind. 115; *Conklin v. The Town of Cambridge City*, 58 Ind. 130; *The City of Logansport v. Seybold*, 59 Ind. 225. Indeed, it is not made a ground for relief in the complaint. Nor did the facts, that the appellee had made preparation for constructing, and had intended to construct, a sidewalk, of his own motion, constitute any ground for relief, for this reason, if for no other, that it does not appear that the town council had any notice or knowledge of the facts.

The first ground relied upon in the complaint for arresting the execution of the contract with Fisher is, that he, the appellee, "ought not to be required to construct a sidewalk as aforesaid, for the reason that said defendant has

not established grade lines or set grade stakes, to guide in the proper construction of said walk, which plaintiff (appellee) thinks defendant (appellant) is in duty bound to do, before requiring him to construct sidewalks as aforesaid."

To what this allegation is intended to apply, is not easily determined from the complaint; whether to the ordinance of the 23d of April, 1875, requiring appellees to construct the sidewalk, or to the contract for its construction by Fisher, made on the 24th day of September, 1875, on the failure of appellee to construct, as required by the ordinance above mentioned. Are the allegations made as a justification of his refusal to obey that ordinance, or as showing illegality in the contract being executed by Fisher? Be it one or the other, or both, we think they make no case for an injunction upon the contract of Fisher.

The council of the town of Bluffton had, by her charter, ample powers in the matter of laying out, opening, grading and improving streets and sidewalks; and it was further provided therein, that "The council shall have power to make other by-laws, and ordinances not inconsistent with the laws of this State, and necessary to carry on the objects of the corporation, and to enforce the observance of all by-laws and ordinances," etc. Acts 1873, p. 31, sec. 8.

It is not denied in the complaint, that the council had acted under this power. That pleading does not purport to show all the legislation of the council on the subject of streets and sidewalks. The presumption is in favor of the existence of all such legislation by the council as was necessary to justify its action. *Kalbrier v. Leonard*, 34 Ind. 497.

Such action is not negatived in the complaint. Now, suppose there was an ordinance existing, defining the width of the sidewalk, the material of which it should be con-

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structed, accompanied by a profile of grade lines, cuts and fills, and containing a provision that the corporation engineer, or other proper officer, at the request of any proprietor or contractor so to do, should set grade stakes and mark the lines, would not such fact be a complete answer to all the grounds of complaint alleged? Besides, it is not averred, that appellee ever informed the council that he was ready to proceed with the work, and desired grade stakes set, etc.

The only remaining ground upon which it was sought to annul, in effect, the contract of the town with Fisher, was, that there was no necessity for any sidewalk, other than that which the proprietor, appellee, was intending to construct.

This is no reason why the town should be compelled to rescind a contract made in good faith with Fisher, in a matter in which the town had jurisdiction, and the right to act in her discretion, thereby, perhaps, subjecting some one to the payment of damages. As we have seen, the town had no notice of the intention of appellee to construct a sidewalk.

The contract with Fisher is not shown to be invalid, nor the action of the council to have been illegal or oppressive, nor that it will occasion great damage to the appellee.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint.

CROPSEY v. HENDERSON, AUDITOR OF STATE.

FEES AND SALARIES.—*Salary of Prosecuting Attorney of Marion Criminal Circuit Court.*—*Jurisdiction.*—*Term of Office.*—*Constitutional Law.*—*Mandate.*—In a proceeding against the auditor of state, for a writ of mandate

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requiring the defendant to issue to the plaintiff a warrant upon the state treasurer for salary alleged to be due to the plaintiff as a prosecuting attorney, the complaint alleged that the defendant had been duly elected and qualified as prosecuting attorney in and for the 16th Judicial Circuit, which was created by the act of December 20th, 1865, Acts 1865, Spec. Sess., p. 153.

Held, on demurrer, that the complaint is insufficient.

Held, also, that the court created by said act was the Marion Criminal Circuit Court, a court of jurisdiction inferior to that of the circuit courts mentioned in section 1 of article 7 of the constitution of this State.

Held, also, that the salary of the prosecuting attorney of such court is to be paid, not out of the state, but out of the county treasury.

Held, also, his term of office not having been fixed by that act, that, by section 2 of article 15 of the constitution of this State, his term of office continues four years.

From the Marion Circuit Court.

H. Burns, for appellant.

T. W. Woollen, Attorney General, for appellee.

WORDEN, J.—This was a petition by the appellant, against the appellee, for a writ of mandate requiring the appellee, as auditor of state, to issue to the appellant a warrant for \$1,000, upon the state treasury.

Demurrer to the petition, for want of sufficient facts, sustained, and judgment for defendant. Exception.

The petition alleges, that, “at the general election held in the county of Marion, State of Indiana, on the second Tuesday of October, 1874, the said plaintiff was duly elected, by the voters of said county, prosecuting attorney in and for the 16th Judicial Circuit, composed of said county of Marion, as required and provided by an act of the General Assembly of said State, entitled ‘An act creating the 16th Judicial Circuit, and providing for the election of a judge and prosecuting attorney thereof, and providing compensation therefor, and declaring its jurisdiction, and providing for a transfer of actions thereto,’ approved December 20th, 1865.

“That said plaintiff was duly commissioned and qualified

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as such prosecuting attorney, and entered upon the discharge of the duties of said office, on the 4th day of November, 1874, the day provided by law on which his said term of office commenced, and continued in the discharge of the duties of said office for the space of two years, to wit, until the 4th day of November, 1876; that, during the time that said plaintiff continued in said office and to discharge the duties thereof, he became and was entitled by law to have and receive, out of the treasury of the State of Indiana, the sum of five hundred dollars annually, as his salary, which amount is now due and remains wholly unpaid."

The petition alleges a due demand upon the auditor, and refusal.

The act alluded to in the petition is the act establishing a criminal court in the county of Marion, called in the act a criminal circuit court, and denominating the territory in which jurisdiction is to be exercised, Marion county, as the 16th Judicial Circuit. 3 Ind. Stat., p. 172.

The question presented by the record is thus stated in the brief of counsel for the appellant: "Is the prosecuting attorney, elected under the provisions of the above named act, governed by the same laws, and entitled to the same compensation, as the prosecuting attorneys that are provided for in the constitution?"

The prosecuting attorney provided for by the constitution is paid his salary out of the state treasury; and, if the appellant is the officer thus provided for, he would seem to be entitled to be paid accordingly. But the law provides for the payment of the salaries of the judges of the criminal circuit courts, as well as of the prosecuting attorneys therein, out of the county treasuries of the counties in which the courts are established. 3 Ind. Stat., p. 181, sec. 4.

The following provisions are found in the seventh article of the constitution:

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“Sec. 1. The judicial power of the State shall be vested in a supreme court, in circuit courts, and in such inferior courts as the General Assembly may establish.

“Sec. 8. The circuit courts shall each consist of one judge, and shall have such civil and criminal jurisdiction as may be prescribed by law.

“Sec. 9. The State shall, from time to time, be divided into judicial circuits; and a judge for each circuit shall be elected by the voters thereof. He shall reside within the circuit, and shall hold his office for the term of six years, if he so long behave well.

“Sec. 11. There shall be elected, in each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for two years.”

It is thus seen, that the judicial power of the State is vested in a Supreme Court, circuit courts, and such inferior courts as the General Assembly may establish. No courts, other than the supreme and circuit courts, can be established, except such as are inferior to the circuit courts.

It is quite plain also, that the prosecuting attorney provided for by the constitution is the prosecuting attorney for the circuit courts provided for by the constitution. The sections of the constitution providing for circuit courts, the division of the State into judicial circuits, and the election of a judge and a prosecuting attorney in each of the judicial circuits, entirely exclude the idea that the prosecuting attorney provided for was to be the prosecuting attorney in any inferior court which the Legislature might establish.

The act above alluded to, establishing the criminal circuit court, provides for the election of a judge and prosecuting attorney for the circuit.

But the court is not a circuit court, within the meaning of the constitution. It is an inferior court. Indeed, it had to be held an inferior court, in order to sustain the

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law creating it. One circuit court, within the meaning of the constitution, could not be created within the territory allotted to another.

That the law creating the court is valid, as establishing a court inferior to the constitutional circuit court, was established in the case of *Clem v. The State*, 33 Ind. 418.

That case has been since followed. It seems to us to follow, that the prosecuting attorney of that court is the prosecuting attorney of an inferior court, and not the prosecuting attorney provided for by the constitution.

It is said that there is no law fixing the duration of the term of office of the prosecuting attorney of the criminal circuit court. We are not aware of any. The act of May 13th, 1869, 3 Ind Stat., p. 180, sec. 2, fixed the length of the term of the judges at four years.

It is urged that the omission by the Legislature to fix the term of office of the prosecuting attorney is evidence that that body regarded him as the officer provided for by the constitution, which specifies the length of his term, requiring no legislation in that respect. Any inference of that kind, that might otherwise have been drawn, is rebutted by the fact, that, in the same act, provision is made for the payment of his salary out of the county treasury, contrary to the law in respect to the payment of the prosecuting attorneys provided for by the constitution.

At the time of the trial below of the case of *Clem v. The State*, *supra*, there was no law fixing the length of the term of the judge of the criminal circuit court. Yet it was held that that fact did not render the creation of the office a void act; nor does it seem to have been regarded as any reason for holding that the judge was a circuit judge, within the meaning of the constitution.

Perhaps the duration of the term of office of the prosecuting attorney of a criminal circuit court would, in the absence of any law, be limited to four years by the second

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section of the fifteenth article of the constitution, which provides as follows :

“ When the duration of any office is not provided for by this constitution, it may be declared by law ; and, if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the General Assembly shall not create any office, the tenure of which shall be longer than four years.”

The reasoning in the Clem case leads to the conclusion, that, in the absence of legislation, the term of the office would extend to four years, and not longer.

We are of opinion that the appellant was not entitled to be paid out of the state treasury, and therefore that the demurrer to the petition was correctly sustained.

The judgment below is affirmed, with costs.

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125	36

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SUPREME COURT.—*Practice.*—*Brief.*—*Waiver of Error Assigned.*—The failure of counsel to discuss, in his brief, errors assigned on behalf of the party for whom he appears, is deemed by the Supreme Court to be a waiver thereof.

NEW TRIAL.—*Refusal of Trial by Jury.*—*Exception.*—*Practice.*—Where a jury trial is demanded by a party, and refused by the court, the party demanding must, to make such refusal available as ground for a new trial, except at the time to such refusal.

From the Marion Superior Court.

H. W. Harrington, for appellant.

J. W. Gordon, *R. N. Lamb* and *S. M. Shepard*, for appellees.

Howk, C. J.—In this action the appellees, as plaintiffs, sued the appellant and another, as defendants, in a com-

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plaint of two paragraphs, upon an open account for goods sold and delivered by the appellees to the defendants.

In the court below, at special term, the cause was put at issue by the answers of the appellant, George O. Griffin, and the appellees' replies thereto. The issues joined were tried by the court, without a jury, and a finding was made for the appellees; and the appellant's motion for a new trial having been overruled, and his exception saved to such ruling, judgment was rendered on the finding, from which judgment he appealed to the court below, in general term.

The judgment rendered at special term was affirmed by the court, in general term, to which judgment the appellant excepted, and appealed therefrom to this court.

The appellant has assigned, as error, the judgment of the court, in general term, affirming the judgment rendered at special term. This alleged error brings before this court, for our consideration and decision, the questions presented by the errors assigned by the appellant in the court below, in general term. The appellant's learned attorney, in his brief of this cause in this court, has confined his argument to the presentation of a single question, namely, his right to a trial by jury of the matters in issue. Upon all the other alleged errors, his brief is entirely silent, and therefore they must be regarded as waived. *Watson v. Piel*, 58 Ind. 566.

The last cause for a new trial, assigned by the appellant in his motion therefor, was as follows:

"Because the court erred in refusing the defendant a trial by jury, which was called for by the defendant, and refused by the court on the ground that a rule of court required, that a jury, if desired, should be called for within a certain time after the cause was set down for trial, and that in this case such demand had not been made until the case was called for trial, which refusal was excepted to by the defendant."

Griffin v. Pate et al.

This cause for a new trial was supported by affidavit, which showed that the appellant had demanded a jury, when the action was called for trial. The difficulty with the appellant's case, however, in so far as this question is concerned, is one that can not be overcome. The record failed to show, that the appellant had in any manner saved an exception to the decision of the court, at special term, in refusing him a trial by jury. On the contrary, it was shown by a bill of exceptions properly in the record, that, when this cause was called for trial in its regular order, and the appellant had demanded a trial by jury, the court refused such jury trial, upon the ground that the appellant had failed to elect a jury trial, and to notify the court of such election, within the time limited by a rule of the court for making such election after the issues in the cause were duly made, which rule provided, that, upon the failure of the parties to announce to the court their election as to the mode of trial, within the time limited, they should be deemed to have elected to try their cause by the court. When this decision was announced by the court, neither the appellant nor his counsel objected or excepted to such decision; but the bill of exception states, that "the said rule having been read by the court, thereupon said cause was submitted to the court for trial and finding, without the intervention of a jury."

In this state of the record it is very clear, we think, that the alleged error of the court, in refusing the appellant a trial by jury, was not saved in the record in such a manner as to present any question for our decision. As the record reads, it shows an acquiescence by the appellant with the terms of the rule of court, without objection or exception thereto, and a ready and willing submission of the cause to the court for trial, without the intervention of a jury. After the trial of the cause, and after the finding of the court for the appellees had been announced,

 Mitchell v. The State.

the record for the first time disclosed the fact that the appellant had demanded, and had been denied, a trial of the issues by a jury. It was then too late to object or except to the decision of the court in refusing such trial by jury.

The statute requires, that "The party objecting to the decision, must except at the time the decision is made." 2 R. S. 1876, p. 176, sec. 343. And, since the adoption of our code, this court has so uniformly held, that the decision complained of must have been excepted to at the time, or else it would not be available as an error, even if erroneous, that this rule of practice needs no citation of authorities to sustain it.

In our opinion, the court below, in general term, committed no error in affirming the judgment of the court, at special term.

The judgment is affirmed, at the appellant's costs.

 MITCHELL v. THE STATE.

CRIMINAL LAW.—*Returning Indictment into Court.*—*Arrest of Judgment.*—*Motion to Quash.*—Where the record does not show that the indictment has been duly returned into open court, a motion to quash or in arrest of judgment should be sustained.

SAME.—*Liquor Law.*—*Name.*—*Idem Sonans.*—Proof of an unlawful sale of intoxicating liquor to one "Hairholts" does not sustain the allegation of an unlawful sale to one "Hairholser."

From the Huntington Circuit Court.

L. P. Milligan, A. Moore, J. T. Alexander and — Hatfield, for appellant.

T. W. Woollen, Attorney General, for the State.

PERKINS, J.—We copy the following from the transcript of the record filed in this cause:

63	276
141	688
63	276
154	443

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“Be it remembered, that heretofore, to wit, on the 21st day of March, 1878, the grand jurors of Huntington county returned the following indictment, to wit:

“State of Indiana, Huntington county, ss. Huntington Circuit Court, March term, A. D. 1878.

“State of Indiana v. James Mitchell.

“Indictment for selling liquor less than a quart.

“The grand jury of Huntington county, in the State of Indiana, good and lawful men, duly and legally empanelled, charged and sworn to enquire into felonies and certain misdemeanors, in and for the body of said county of Huntington, in the name and by the authority of the State of Indiana, on their oath present, that one James Mitchell, late of said county, on the 25th day of March, 1877, at said county and State aforesaid, did then and there unlawfully sell a less quantity of intoxicating liquor than a quart at a time, to wit, one gill, to one John Hairholser, at and for the price of ten cents. He, the said James Mitchell, not then and there having a license to sell intoxicating liquors in a less quantity than a quart at a time, under the existing laws of the State of Indiana; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana.

“ASBURY E. STEELE, Prosecuting Attorney.”

Indorsed: “A true bill.

“CLINTON C. ELLIS, Foreman.

“Witness: JOHN HAIRHOLSER.”

A motion to quash was overruled, and exception reserved.

Plea, not guilty; trial and conviction by jury.

Motion for a new trial denied, as was also a motion in arrest. Judgment on the verdict.

There was testimony on the trial, tending to show a sale of a glass of liquor to John Hairholts. But there was no evidence that Hairholts, who purchased the liquor, was Hairholser, named in the indictment.

It is claimed :

1. That the record does not show that the indictment upon which the trial was had was returned into open court, as required by section 16 of the criminal code of pleading and practice, 2 R. S. 1876, p. 375 ;

2. That there was a variance between the indictment and the proof.

We doubt if Hairholser and Hairholts are *idem sonans*. See *Black v. The State*, 57 Ind. 109.

If *Adams v. The State*, 11 Ind. 304, is adhered to as law, the motion to quash should have been sustained, or the judgment should have been arrested. That case does not appear to have been overruled upon the point to be mentioned, but, on the other hand, to have been approved; that point is, that the indictment is not shown to have been returned into open court. For aught that appears in the record, the indictment may have been returned during a recess in the sitting of the court, handed to the clerk and filed by him, without having been received and inspected by the court. See *Yundt v. The People*, 65 Ill. 372; *Green v. The State*, 19 Ark. 178.

The judgment is reversed, and the cause remanded, etc.

GUETIG v. THE STATE.

CRIMINAL LAW.—Murder.—Insanity Produced by Disease.—Instruction to Jury.—On the trial of a defendant indicted for murder, wherein he had introduced evidence tending to prove that he was subject to attacks of epilepsy, and that such disease tends to produce insanity, the court instructed the jury, that, “ When the defence of insanity is interposed to a prosecution for murder, the jury should carefully and intelligently scrutinize and consider the evidence by which it is sought to be established. If the jury should find from the evidence, that there is a reasonable doubt whether

63	278
140	303
142	290

63	278
148	703

63	278
168	622

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the defendant has been subject to attacks of epilepsy, and if this fact (if so found) has been supplemented by testimony of expert witnesses, establishing to the satisfaction of the jury (evidence raising a reasonable doubt being sufficient), that epilepsy is a disease which tends to produce insanity, *this evidence would not be sufficient to raise a reasonable doubt of his sanity, at the time of the alleged commission of the homicide.* There must be sufficient evidence to raise a reasonable doubt of actual insanity at the time of the alleged commission of the offence."

Held, that the instruction was erroneous.

Held, also, that an erroneous instruction is not cured by a proper instruction unless the former be withdrawn.

From the Marion Criminal Circuit Court.

J. L. Griffiths and *A. F. Potts*, for appellant.

T. W. Woollen, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

BIDDLE, J.—The appellant was indicted for murder in the first degree, alleged to have been committed in killing Mary McGlew purposely and with premeditated malice. Upon a plea of not guilty and a trial by jury, he was convicted and sentenced to suffer the penalty of death.

Numerous exceptions were reserved in the record, but such questions as have been discussed before us arose under a motion for a new trial.

The evidence, which is all before us, introduced at the trial, tends to prove that the appellant was subject to attacks of epilepsy. There was also evidence introduced in the case, by the testimony of experts, tending to show that epilepsy is a disease which tends to produce insanity; indeed, the insanity of the appellant, at the time he committed the deed alleged against him, was the main defence at bar. In reference to the defence of insanity the court, over the objections and exceptions of the appellant, instructed the jury as follows:

"25. When the defence of insanity is interposed to a prosecution for murder, the jury should carefully and intelligently scrutinize and consider the evidence by which it is sought to be established. If the jury should find

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from the evidence, that there is a reasonable doubt whether the defendant has been subject to attacks of epilepsy, and if this fact (if so found) has been supplemented by the testimony of expert witnesses, establishing to the satisfaction of the jury (evidence raising a reasonable doubt being sufficient), that epilepsy is a disease which tends to produce insanity, this evidence would not be sufficient to raise a reasonable doubt of his sanity at the time of the alleged commission of the homicide. There must be sufficient evidence to raise a reasonable doubt of actual insanity at the time of the alleged commission of the offence."

It is contended, on behalf of the appellant, that this instruction is erroneous, because of its uncertainty and tendency to confuse and mislead the jury, and because it directly instructs the jury as to the weight of evidence, and thus assumes to decide a question of fact which is beyond the province of the court's power or duty.

The State contends that the instruction is not erroneous, but is within the authority of the cases of *Sawyer v. The State*, 35 Ind. 80, and *Bradley v. The State*, 31 Ind. 492; and, although the instruction, standing by itself, might be erroneous, yet that all the instructions given by the court, taken together, present the law correctly, and, therefore, the instruction can not be held as sufficient to reverse the judgment.

In the case of *Sawyer v. The State*, *supra*, Sawyer was indicted for the murder of his wife. At the trial, the appellant offered to prove "that the deceased, Lizzie Sawyer, had, for a long time previous, been having adulterous intercourse with a man by the name of Bibbs and others, of which adulterous conduct the defendant had, for a long time, been cognizant." The evidence, on objection made by the State, was rejected, and the defendant excepted. In this case the court, after holding the evidence to be incompetent to

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prove a justification, excuse or even palliation of the offence, remarked :

“ It is claimed, however, that the evidence should have been permitted to go to the jury, on the ground that it tended to establish the insanity of the accused. * * But the evidence, as offered, was incompetent for that purpose.”

There are some important distinctions between this case and the one before us. It is clear that the fact that Sawyer's wife had been committing adultery with Bibbs and other men, and that Sawyer knew the fact, would not tend to produce the disease of insanity in Sawyer. It might very much enrage or distract him temporarily, but would not tend to produce insanity as a disease. This is a very different statement from the facts supposed in the instruction we are considering, namely, that Guetig had attacks of epilepsy, and that epilepsy tended to prove insanity. Besides, in the Sawyer case, the question was one upon the admissibility of evidence, which is solely for the court to decide. The question in the present case is one upon the insufficiency of the evidence to prove a given fact, which is solely for the jury to decide.

The case of *Bradley v. The State*, *supra*, is cited and quoted from with approval, in support of *Sawyer v. The State*, *supra*, and is not in conflict with it in any respect. Neither of these cases supports the views of the State, as urged in the case under consideration.

The instruction complained of, compactly stated, plainly means, that, if the appellant has been subject to attacks of epilepsy, and epilepsy is a disease which tends to produce insanity, these facts are not sufficient to raise a reasonable doubt of his sanity, at the time of the alleged commission of the homicide. It is not clear in the statement of the time of the attacks of the epilepsy, in relation to the time of the commission of the offence. For aught that the

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instruction says, in words, it might be understood to mean, that, if the appellant had attacks of epilepsy on the day the deed was done, (a fact, indeed, which the evidence tends to prove,) or an hour before, or even at the time, it still would not be sufficient to raise a reasonable doubt of his sanity at the time the homicide was committed. Such a view would be plainly erroneous. The instruction is also erroneous, because it directly states that certain evidence, which is legitimately before the jury, is not sufficient to prove a certain fact, or to raise a reasonable doubt of a certain fact.

What evidence proves, or tends to prove, after it has gone to the jury, is a question solely for the jury to decide; and it is error for the court to interfere with their decision upon the weight of evidence, by an instruction.

Nor do we concur with the views of the State, that the instruction, if objectionable, can be corrected by other instructions which are not objectionable.

We do not find any other instruction given in this case, upon the question of epilepsy, as tending to produce the disease of insanity; and we have frequently decided that an erroneous instruction can not be corrected by an instruction which is not erroneous, unless the erroneous instruction be withdrawn.

The following authorities support our views:

Longnecker v. The State, 22 Ind. 247; *Larue v. Russell*, 26 Ind. 386; *Cain v. Hunt*, 41 Ind. 466; *Kintner v. The State*, 45 Ind. 175; *Barker v. The State*, 48 Ind. 163; *Dæring v. The State*, 49 Ind. 56; *The Toledo, Wabash and Western R. W. Co. v. Shuckman*, 50 Ind. 42; *Summers v. The State*, 51 Ind. 201; *Greer v. The State*, 53 Ind. 420; *Matthews v. Story*, 54 Ind. 417; *Pratt v. The State*, 56 Ind. 179; *McCarthy v. The State*, 56 Ind. 203; *Clifford v. The State*, 56 Ind. 245; *Veatch v. The State*, 56 Ind. 584; *Broker v. Scobey*, 56 Ind. 588; *Killian v. Eigenmann*, 57 Ind. 480; *Richie v. The State*,

Caldwell v. The State.

58 Ind. 355; *Snyder v. The State*, 59 Ind. 105; sec. 19, art. 1, constitution, 1 R. S. 1876, p. 23.

Other questions are presented in the case, but, as they will be opened by a new trial, and are not likely to arise again, we do not examine them.

The judgment is reversed, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

CALDWELL v. THE STATE.

CRIMINAL LAW.—*Betting on Election.*—*Parol Evidence of Terms of a Writing.*—Parol evidence of the contents of a memorandum of the terms of a bet upon the result of an election is inadmissible, without first accounting for the absence of such memorandum.

From the Fayette Circuit Court.

W. C. Forrey, for appellant.

T. W. Woollen, Attorney General, for the State.

NIBLACK, J.—The indictment on which this prosecution was based charged, “that, on the 15th day of October, A. D. 1876, and in the county of Fayette and State of Indiana, Samuel Caldwell then and there unlawfully won and took from one Marshal Frazee twenty-five dollars, by then and there unlawfully betting and wagering with him, said Marshal Frazee, for said twenty-five dollars, upon the result of a certain election had and held on the 10th day of October, A. D. 1876, in the State of Indiana, for the election of a Governor of said State.”

The defendant moved the court to quash the indictment, but his motion was overruled.

The court to which the cause was submitted for trial

Caldwell v. The State.

found the defendant guilty as charged, and, overruling a motion for a new trial, rendered a judgment of conviction upon the finding.

On the trial, one Frank Williams was produced on behalf of the State, who testified, that, sometime in the Fall, 1876, but before the state election of that year, Caldwell and Frazee came to him with an envelope, but he could not tell just what was said by them;—he was, however, to hand over the envelope to one of the parties, on a contingency; and that, after the election, he had given the envelope to Caldwell. The prosecuting attorney asked the witness to “state what writing or figures was on the envelope.” The defendant objected to the witness answering that question, upon the ground that his answer would not afford the best evidence of the contents of such writing or figures, but the court overruled the objection, and the witness answered, in substance, as follows:

“The words on the envelope were, ‘If Blue Jeans Williams is elected Governor, or Governor of Indiana,’ I can not say positively which, ‘to give the envelope to Mr. Caldwell.’ On the other side, ‘If Harrison is elected, to hand it to Frazee.’ These were all the marks that were on the envelope.”

In the case of *Frazee v. The State*, 58 Ind. 8, which was, in its essential features, the counterpart of the one in hearing, it was held that evidence, in substance the same as above set out, was erroneously admitted, upon the ground that the non-production of the envelope was not satisfactorily accounted for, and that no proper foundation had been laid for secondary evidence of the contents of the writing upon it.

Following that case, as we feel it our duty to do, we have to hold that the evidence admitted in this case as above, over the objection of the defendant, was admitted erroneously.

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For that error the judgment will have to be reversed.

Other questions are presented by the record, but they have all been ruled upon and settled in the case of *Frazee v. The State, supra*, and we need not further consider them at the present hearing.

The judgment is reversed, and the cause remanded for a new trial.

STARCK v. THE STATE.

68	285
155	559

CRIMINAL LAW.—Larceny of Estray.—Felonious Intent.—In order to constitute a larceny of an estray, converted by the finder to his own use, the felonious intent to misappropriate must have existed at the time he took the estray into his possession.

SAME.—Intent Subsequently Formed.—Instruction.—The defendant in such case has a right to have the jury trying the case instructed, that, if the felonious intent was formed after he had taken possession of the estray, he was not guilty of larceny.

From the Pulaski Circuit Court.

W. Spangler, for appellant.

T. W. Woollen, Attorney General, for the State.

WORDEN, J.—The appellant was indicted in the court below for the larceny of a heifer, and, upon trial, was convicted of the offence.

The facts appear to have been, that the heifer was a stray animal, that came to the premises of the appellant in the Spring of 1877, and herded to some extent with his cattle. He drove her away, but she came back, and he fed her with his cattle. Finally, in June of that year, he killed the heifer, and appropriated her to his own use.

There did not appear to have been any marks upon the heifer, from which he could have ascertained her ownership; nor did it appear that the appellant knew or could have ascertained her ownership by reasonable inquiry.

Starck v. The State.

The appellant asked the court to charge the jury as follows:

“If the jury find, from the evidence, that the property mentioned in the indictment was an estray, and that, at the time the same came into the possession of the defendant by finding it or letting it run with his cattle, and taking care of it with his cattle, and at the time he first got possession of it, he did not intend to steal it, but that the intention to steal it came upon him afterward, and, in pursuance of this intention, formed after he first got it, he did kill and convert the same to his own use, this would not constitute larceny, and in that case your verdict should be for the defendant.”

This charge the court refused, but gave the following:

“That, if the jury believe, from the evidence, beyond a reasonable doubt, that, at the very time the defendant took possession of the animal described in the indictment, he intended to steal it and convert it to his own use, [and] did, in pursuance of such intention, kill and convert the same to his own use, all the other material allegations having been made out, this would make the defendant guilty of either grand or petit larceny, according to the value.”

It is claimed by counsel, that larceny could not have been committed, under the circumstances. Where the finder of goods (not stray animals) does not know the owner, and has nothing to indicate who the owner may be, or where he may be found, his appropriation of the goods will not be larceny, even though he has not advertised the goods. And the mere fact that he had secreted the goods, or denied finding them, will not make it larceny. *Bailey v. The State*, 52 Ind. 462.

But it is said in 2 Wharton Crim. Law, sec. 1799, that “The rule, that larceny is not committed by one who finds goods, the owner of which he supposes can not be ascertained, does not apply to one who finds cattle at large in a high-

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way and converts them to his own use." The authorities cited are: *People v. Kaatz*, 3 Parker C. C. 129; *The State v. Martin*, 28 Mo. 530; *The State v. Williams*, 19 Mo. 389. It is said, in the same section, that "It is larceny to take a horse found astray on the taker's land, with intent to conceal it until its owner shall offer a reward for its return, and then to return it, and claim the reward." *Commonwealth v. Mason*, 105 Mass. 163. See also *Regina v. O'Donnell*, 7 Cox C. C. 337.

We find it unnecessary to pass upon the question, for the purposes of the case. We think it abundantly clear, that, in order to constitute larceny, the appellant must have intended to appropriate the animal to his own use, at the time he first took possession of it ; and that a conversion in pursuance of a subsequently formed intention would not make him guilty of larceny. *Regina v. Matthews*, 12 Cox C. C. 489; S. C., 6 Eng. Rep., Moak's Notes, 329; *Umphey v. The State*, ante, p. 223.

The charge given by the court was correct ; but it stated only one side of the proposition. The court said to the jury, in substance, that, if the appellant, at the very time he took possession of the animal, intended to steal it and convert it to his own use, that would constitute larceny. Perhaps the jury might well have inferred from the charge, that, *unless* the felonious intent was formed at the time the appellant took possession of the animal, the conversion would not amount to larceny. But we think the appellant had the right to have the jury so informed, in express terms, so that the point of law would not be left to inference or conjecture. The charge, that, if the felonious intent was formed at the time the appellant took possession of the animal, the conversion would constitute larceny, did not necessarily carry with it the conclusion, that, if it was not then formed, but afterward, the conversion would not amount to larceny.

 Reed v Finton.

The jury were the judges of the law and the facts; and when they retired for consultation they may have said, "The court has advised us as to the effect of the formation of the felonious intent at the time the defendant took possession of the animal, but has said nothing about the effect of the formation of that intent afterward. We can not see that it makes any difference when the intent to steal was formed, if it was formed and executed."

We think the court erred in refusing the charge asked.

Besides, the evidence is quite unsatisfactory upon the point of the felonious intent at the time the animal came into the defendant's possession.

The judgment below is reversed, and the cause remanded for a new trial.

NOTE.—The clerk will give the proper notice for the return of the prisoner.

 REED v. FINTON.

68 288
154 412

PROMISSORY NOTE.—*Assignment.*—*Endorsement.*—*Complaint by Assignee, in Justice's Court.*—*Defect of Parties.*—In an action originating before a justice of the peace, by an assignee, against the maker, on a promissory note, the complaint alleged that the note in suit had been assigned to the plaintiff "in writing," and that copies of both the note and assignment were attached to the complaint, as parts thereof, but in fact no copy of the assignment was so attached.

Held, on demurrer for failure to make the payee a party defendant, that the complaint is insufficient; as, even in a justice's court, the payee must be made a party defendant in such an action, unless the assignment be by endorsement upon the note.

From the Kosciusko Circuit Court.

C. Clemans and A. C. Clemans, for appellant.

S. S. Baker and — Cane, for appellee.

Reed v. Finton.

Howk, C. J.—In this action, the appellee sued the appellant, before a justice of the peace of Kosciusko county.

In his complaint the appellee alleged, in substance, that the appellant was indebted to appellee in the sum of one hundred and sixty-two dollars, as evidenced by a certain promissory note executed by the appellant to one Stephen Reed, and assigned in writing to the appellee by said Stephen Reed, a copy of which note and assignment was filed with and made part of said complaint; and that said note remained wholly unpaid. Wherefore, etc.

A copy of the note in suit is set out, but no copy of any assignment of the note is to be found in the record.

On appeal, in the circuit court, the appellant demurred to the appellee's complaint, upon the following grounds of objection:

1. That it did not state facts sufficient to constitute a cause of action; and,

2. That there was a defect of parties defendants to this action, in this, that the said Stephen Reed should have been made a party defendant, to answer as to his interest in the note in suit, and his assignment thereof.

The court overruled this demurrer, and to this decision the appellant excepted. The cause was tried by the court, without a jury, and a finding was made for the appellee, for the amount of the note sued upon; and, over the appellant's motion for a new trial, and his exception duly saved, judgment was rendered by the court on its finding.

In this court, the following decisions of the circuit court have been assigned by the appellant, as errors:

1. In overruling his demurrer to appellee's complaint; and,

2. In overruling his motion for a new trial.

1. The appellant's demurrer to appellee's complaint, upon the ground that there was an apparent defect of parties defendants to the action, should have been sustained.

Reed v. Finton.

In section 6 of the practice act it is provided, that, "When any action is brought by the assignee of a claim arising out of contract, and not assigned by endorsement in writing, the assignor shall be made a defendant, to answer as to the assignment, or his interest in the subject of the action." 2 R. S. 1876, p. 35. This requirement of the statute is applicable as well to actions commenced before a justice of the peace, as to those commenced in the circuit or superior court. It provides, in plain terms, that, unless the assignment of the contract is in writing and endorsed on the contract, "the assignor shall be made a defendant." In the case at bar, it was alleged in the complaint, that the assignment of the note in suit was in writing, but it was not alleged therein that such assignment was by endorsement of said note. Possibly, if a copy of the alleged written assignment had been set out in the record, as a part of the record, we might have been able to determine therefrom whether or not such written assignment was made by an endorsement of the note; but, in the absence of such a copy, we are bound to conclude, as we do, that such assignment in writing, as alleged, was not by an endorsement of the note in suit, and therefore that the assignor Stephen Reed should have been made a defendant in this action. This conclusion is in harmony with, and is fully sustained by, a number of the decisions of this court. *Strong v. Downing*, 34 Ind. 300; *Shane v. Lowry*, 48 Ind. 205; *Clough v. Thomas*, 53 Ind. 24; and *Reed v. Garr*, 59 Ind. 299.

2. The evidence on the trial is not in the record; and therefore no question is presented for decision, by the alleged error of the court in overruling the appellant's motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings.

 Kendel, Administrator, v. Judah *et al.*

KENDEL, ADMINISTRATOR, v. JUDAH ET AL.

63	261
152	521

NEW TRIAL.—*Form of Motion For.*—*Practice.*—Where the form of a motion by a party for a new trial is general as to all of several parties opposing, but the grounds assigned therein relate to errors occurring as to a part only of such parties, it is not error to overrule the motion.

SAME.—*Trial at One, and Finding at Next, Term.*—*Motion for a New Trial.*—*Exception.*—*Bill of Exceptions.*—*Evidence.*—Where a cause has been submitted for trial, and the evidence heard, and the court takes the matter under consideration until the next term of court, the party questioning the finding then announced may, at that term, properly make a motion for a new trial, on the ground that the finding is contrary to law or not supported by sufficient evidence, and file his bill of exceptions, embodying the evidence and setting out his exception to the overruling of such motion.

From the Gibson Circuit Court.

W. M. Land, for appellant.

J. E. McCullough, for appellees.

PERKINS, J.—The appellant commenced a suit in the Gibson Circuit Court, in time for trial at the September term, 1876, of said court.

No exception was taken to any ruling of the court in bringing the cause to issue.

The record recites, that :

“Afterward, on the 26th day of said month (September) as aforesaid, the following proceedings were had, to wit :

“Comes now the plaintiff and files his reply to the answers of the defendants, and this cause being at issue is by agreement submitted to the court for trial, and, the evidence being heard, the court takes the matter under consideration until the next term of this court, to which time this cause is continued.”

The record further recites, that :

“Afterward, at the November term, 1876, of said court, on the 14th day of December, in said year, the following

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proceedings were had, to wit: Come the parties by their attorneys, and the issues heretofore joined between them are submitted to the court for trial; and the evidence being heard, and the court sufficiently advised in the premises, finds for the plaintiff, that there is due and owing to him, on the mortgage in his complaint mentioned, the sum of seven thousand six hundred and twenty dollars. The court further finds that said mortgage is a senior and prior lien, on the undivided one-half of all the real estate described in plaintiff's complaint, to the liens, rights and equities of all the defendants herein, except as to the right and lien of the said Samuel B. Judah, John M. Judah and Noble B. Judah in and to lot number four (4) in block number two (2) in the original plan of the town of Hazleton; and the court finds that the said Judahs' lien on said last mentioned lot, acquired by purchase at sheriff's sale, as set out in the complaint herein, is a lien thereon prior to the lien of plaintiff's mortgage. The court further finds that said mortgage ought to be foreclosed," etc.

"Thereupon the plaintiff moved for a new trial, and filed the following reasons in writing:

" '1st. Because the finding and decision of the court in favor of the defendants Judahs is not sustained by sufficient evidence.

" '2d. Because said finding and decision are contrary to law.' Which motion the court overrules, to which decision the plaintiff at the time excepted.

"And now he prays that this may be signed as his bill of exceptions and made a part of the record in this cause; which is accordingly done, this 16th day of January, 1877."

[Signature of the Judge.]

The only error assigned is the overruling of the motion for a new trial.

The motion for a new trial was general as to all the defendants, while no error was claimed in the motion to have

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occurred on the trial, except as to a small portion of them, viz., the Judahs. This would probably have justified the overruling of the motion. But the motion is based upon an alleged erroneous finding upon the evidence. The finding was not so clearly wrong as to justify us in setting it aside.

The appellees insist upon another point. They claim that the evidence is not before the court by the bill of exceptions. The evidence appears to have been heard at the September term, at which time no bill of exceptions was filed embodying it, and no time given beyond the term to prepare one.

The statute enacts, sec. 343, 2 R. S. 1876, p. 176, that:

“The party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court.”

In the case at bar, no exception was taken to any ruling or action of the court at the September term. No objection to any item of evidence was made. Hence there was no occasion to obtain a bill of exceptions. Had any ruling of the court been excepted to at the September term, it would have been necessary to obtain a bill of exceptions, signed by the judge at the time, or to obtain an extension of time to file one.

At the next, the November, term, when the court announced its finding, a motion for a new trial was made and overruled, to which action of the court in overruling said motion exception at the time was taken, and a bill of exceptions was prepared, embodying the evidence given at the September term. We think this was a proper course of practice.

The judgment is affirmed, with costs.

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WILSON, ADMINISTRATOR, v. STEWART ET AL.

MISTAKE.—*Reforming Mortgage executed by Husband and Wife.*—*Parties.*—A mistake in the description of lands belonging to a decedent, intended to be included in a mortgage executed in his lifetime by him and his wife, may be corrected in an action for that purpose, against his widow and heirs or devisees and administrator or executor.

SUPREME COURT.—*Notice of Appeal from Judgment for one of several Co-Parties.*—Where, in an action against several defendants, judgment, on separate demurrer to the complaint, is rendered in favor of one defendant, and, on trial, against the others, notice to the latter of an appeal by the plaintiff to the Supreme Court, from such judgment on demurrer, is not necessary.

From the Hamilton Circuit Court.

D. Moss, for appellant.

J. W. Evans and *R. R. Stephenson*, for appellees.

NIBLACK, J.—This was a proceeding by Robert L. Wilson, administrator of the estate of Wesley Jameson, deceased, against the widow, heirs and the administrator of the estate of David Stewart, deceased, for the reformation and foreclosure of a mortgage.

The complaint alleged, that, on the 17th day of July, 1872, David Stewart and Elizabeth Stewart, his wife, executed a mortgage to the said Wesley Jameson, then in full life but since deceased, to secure the payment of certain promissory notes of the said David Stewart, copies of which were filed with the complaint.

That, by the execution of said mortgage, it was the intention of all the parties to the same to mortgage, and include within it, certain tracts of land particularly described in the complaint; but that, by the mutual mistake and inadvertence of the parties to such mortgage, and the draughtsman thereof, other lands were described in said mortgage, to which the said David Stewart had no title whatever. Also, that since the execution of said mortgage the said David Stewart had died, leaving the said Elizabeth Stew-

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art, as his widow, and Sarah White, intermarried with one William White, James J. Stewart, Matilda J. Stewart and Reuben E. Stewart, as his children surviving him; and that Eli Shumack has since become the administrator of his estate, in place of Daniel Fisher, who was executor of the decedent's last will.

The defendant Elizabeth Stewart demurred separately to the complaint, and her demurrer was sustained.

Upon a trial between the plaintiff and the other defendants, judgment was rendered against the estate of the said David Stewart, for the amount due upon the notes, and against the children of the said decedent, Stewart, above named, for the reformation of the mortgage, as prayed for, and for a foreclosure of it, as so reformed, upon two-thirds of the mortgaged lands.

The plaintiff, declining to amend his complaint, or to further plead, as against the said Elizabeth Stewart, judgment was rendered in her favor upon her demurrer.

Error is assigned only upon the decision of the court sustaining Mrs. Stewart's demurrer to the complaint.

The objection urged to the sufficiency of the complaint, as against Mrs. Stewart, is, that, as it showed her to have been a married woman at the time of the execution of the mortgage, the facts alleged did not make out a proper case against her for the reformation of the mortgage, and authorities are cited to sustain that position. This court, however, upon full consideration, has recently held that the deed of a married woman may be reformed in any matter of description merely, in the same manner, and to the same extent, as if she had been unmarried at the time of its execution, and that we still consider to be the better and more reasonable rule, as applicable to the system of laws adopted in this State for the alienation of property. *Hamar v. Medsker*, 60 Ind. 413; *Carper v. Munger*, 62 Ind. 481.

Following these authorities, we are led to the conclusion

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that the court erred in sustaining Mrs. Stewart's demurrer to the complaint.

In the assignment of error in this court, and the issuance and service of notice of this appeal, the names of James J. Stewart and Matilda Stewart, two of the defendants below, are omitted from amongst the names of the appellees, and for that reason counsel for the appellees move to dismiss the appeal.

This appeal is really and only from the judgment in favor of Mrs. Stewart; and her codefendants below are unnecessary parties to the appeal.

The motion to dismiss the appeal is therefore overruled.

The judgment below, in favor of Elizabeth Stewart upon her demurrer to the complaint; is reversed, at her costs, and the cause remanded, with instructions to overrule her demurrer and for further proceedings.

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VENDOR'S LIEN.—*Lands Conveyed to Purchaser's Wife.*—*Judgment.*—*Promissory Note.*—The vendor of a tract of land, at the request of the purchaser, conveyed part thereof to the latter's wife and the residue to the purchaser, taking of the latter, for an unpaid balance of the purchase-money, his promissory note. Such note becoming due and remaining unpaid, the vendor obtained personal judgment thereon against the purchaser, and, the latter having died insolvent, the judgment plaintiff instituted an action to enforce a vendor's lien against the whole of such tract of land, for the amount of such judgment.

Held, on such facts, that the plaintiff is entitled to the lien sought.

JUDGMENT.—*Extent of Relief Granted.*—The extent of the relief to be granted by a judgment is restricted to the relief prayed for in the complaint, only in cases where there is no answer.

SAME.—*Supreme Court.*—*Petition for Rehearing.*—The fact that the judgment of the Supreme Court, in a case wherein an answer was filed, is broader than the relief prayed for in the complaint, is not ground for a rehearing.

From the Montgomery Circuit Court.

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R. B. F. Peirce, P. S. Kennedy and W. T. Brush, for appellant.

W. A. Tipton, M. D. White and C. M. Travis, for appellees.

BIDDLE, J.—Complaint by appellant, to enforce a vendor's lien against certain lands.

No question is presented upon the pleadings.

Verdict and judgment against the appellant. He appeals to this court, and insists that the verdict is contrary to the evidence and contrary to law, and, by a motion for a new trial, has presented these questions for our consideration.

There is no serious conflict in the evidence; it proves the following facts beyond any fair ground of dispute:

In March, 1873, the appellant sold to George Thorn a certain farm, for the consideration of four thousand eight hundred dollars, four thousand dollars of which was to be paid to the appellant by W. C. Lockhart: for the remaining eight hundred dollars, George Thorn executed his note to the appellant. At the request of Thorn, three-fourths of the land was conveyed by the appellant to Thorn's wife, and the remaining fourth to Thorn himself. Thorn failed to pay the note of eight hundred dollars, and in May, 1875, the appellant recovered judgment against him for eleven hundred and eleven dollars and nineteen cents, founded upon the note. Thorn became insolvent, and died without having paid any part of the judgment.

There is no dispute in the case, except as to the amount of the judgment accruing upon the note executed by Thorn to the appellant.

We know of no reason, and none has been shown to us, why, upon this state of facts, the appellant is not entitled to his vendor's lien on that part of the farm conveyed to George Thorn, and also on the entire tract sold.

The appellees insist, however, that the sale of the farm

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was made to Thorn's wife, and not to Thorn. We think the evidence is overwhelmingly the other way. But it does not seem to us material whether the sale was made to Thorn or his wife; there is no dispute about the fact that one-fourth of the farm was conveyed to Thorn, and, as to that, the vendor would have his lien, although the other three-fourths were conveyed to his wife.

We are not deciding the case upon the *weight* of evidence; we can not see *any* evidence against the substantial facts which entitle the appellant to his vendor's lien. It seems to us that the error committed consists in the application of the law to the facts, and not in the insufficiency of the facts to sustain the vendor's lien.

The judgment is reversed, at the costs of the appellee, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

ON PETITION FOR A REHEARING.

BIDDLE, J.—The appellee desires a rehearing, upon the ground that the judgment is broader in the opinion than is prayed for in the complaint. The facts averred in the complaint authorize the judgment pronounced in the opinion. The court is confined, in granting relief, to the prayer in the complaint, only in cases where there is no answer; in all other cases any relief may be granted consistent with the complaint. 2 R. S. 1876, p. 188, sec. 380; *Colson v. Smith*, 9 Ind. 8; *Mandlove v. Lewis*, 9 Ind. 194; *Resor v. Resor*, 9 Ind. 347; *Hunter v. McCoy*, 14 Ind. 528. This case, as an answer was filed, comes within the above rule. The vendor is entitled to his lien on all or any part of the land sold, as between the vendor and the vendees, as well on the part conveyed to Mary C. Thorn as on the part conveyed to George Thorn. The opinion is modified accordingly.

He need not assert his lien against all the land unless he wishes to, but the fact that all the land is not included in

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the prayer of the complaint affords no ground to support a petition for a rehearing. The petition is overruled.

Opinion filed at May term, 1878.

Petition for a rehearing overruled at November term, 1878.

TUCKER ET AL. v. GARDINER.

PROMISSORY NOTE.—*Action before Justice of the Peace.—Practice.—Pleading.—Supreme Court.*—On appeal to the Supreme Court, in an action on a promissory note, commenced before a justice of the peace, wherein the note itself was the only cause of action filed, the record contained copies of the note only as they were set out in the justice's transcript and the bill of exceptions containing the evidence.

Held, that an objection, that no cause of action was on file in the circuit court, can not be made for the first time in the Supreme Court.

SAME.—*Failure of Justice to Transmit Note.—Motion to Dismiss Action.*—Where, on appeal of such action to the circuit court, the justice fails to transmit the note with the transcript, the proper practice for the defendant is to move to dismiss the suit for want of a cause of action.

SAME.—*Cause of Action.*—The note itself is a sufficient cause of action in such a suit.

SUPREME COURT.—*Weight of Evidence.*—The Supreme Court will not disturb a finding on the mere weight of evidence.

From the Union Circuit Court.

L. H. Stanford, J. E. Tucker and C. L. Seward, for appellants.

J. Yaryan and J. L. Yaryan, for appellee.

Howk, C. J.—The appellee sued the appellants, in this action, before a justice of the peace of Union county.

The only complaint or cause of action filed before the justice by the appellee was a promissory note, of which the following is a copy:

“COLLEGE CORNER, April 20th, 1866.

“One year after date I promise to pay to the order of

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J. F. Gardiner forty-five dollars and fifty cents (\$45.50),
value received. (Signed,) J. O. TUCKER,

“J. E. TUCKER.”

Before the justice, there was a finding and judgment for the appellee, and an appeal therefrom to the circuit court.

The cause was tried by the court without a jury, and a finding was made for the appellee, for the amount due on said note. The appellants' motion for a new trial was overruled, and to this ruling they excepted. Judgment was then rendered by the court, on its finding, from which judgment this appeal is now prosecuted.

In this court the appellants have assigned the following alleged errors:

1. That it did not appear, that any complaint had ever been filed in this action, either before the justice or in the circuit court;

2. That the complaint did not state facts sufficient to constitute a cause of action;

3. That the court erred in overruling their motion for a new trial; and,

4. That the court erred in refusing to grant a new trial.

The record fails to show, that the appellants made any objection, either before the justice or in the circuit court, to the want of any complaint or to the insufficiency of the appellee's cause of action; but these objections are made for the first time, in this court. A certified transcript of the proceedings in this action before the justice is set out in the record; and in this certified transcript there appeared a copy of the note in suit. The note itself was not elsewhere set out in the record, save in the bill of exceptions containing the evidence adduced upon the trial in the circuit court. From this state of the record, the appellants' counsel claim, as we understand them, that we must assume there was no complaint or cause of action on

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file in the circuit court; for, if there had been, the clerk of that court, in the discharge of his duty, would have set it out in the record. We think that this position of counsel is not well taken. If, in fact, the note in suit had not been transmitted by the justice, as the law required, to the circuit court, and the appellants wished to derive any benefit from the omission of the justice to send up the note with his transcript, the appellants should have moved the circuit court to dismiss the suit for the want of a cause of action. Not having done so, we must presume that the objection, if it in fact existed, was waived by the appellants, and that the suit was tried, as it might have been, upon the copy of the note in the justice's transcript. This would not be a violent presumption, when nothing to the contrary was shown by the record, as in this case.

In section 35 of the act defining the jurisdiction, powers and duties of justices of the peace in civil cases, approved June 9th, 1852, it is provided, that, in all suits commenced by summons, the plaintiff might file with the justice "the written instrument which is the foundation of his suit." 2 R. S. 1876, p. 614. In suits upon promissory notes before justices of the peace, whether by the payee or the assignee thereof, the note itself has always been regarded, in this State, as a sufficient statement of the plaintiff's cause of action. *Barnett v. Juday*, 38 Ind. 86.

It is earnestly insisted by the appellants' counsel, that the court below erred, in overruling their motion for a new trial. The causes assigned for such new trial were, that the finding of the court was contrary to law, and that it was not sustained by sufficient evidence. On the trial, the appellee gave in evidence the note in suit, and rested. The appellant James O. Tucker testified that he was not indebted to the appellee, at the time he signed the note. The appellant Joseph E. Tucker also testified that he was not indebted to the appellee, when he signed the note, and

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that it was given without any consideration; that it was given for a balance on another note, held at the time by the appellee, as the attorney of certain parties in Cincinnati, Ohio, upon the surrender thereof, against said James O. Tucker; and that the note in suit was never to be paid, unless his clients in Cincinnati refused to accept of a certain sum then paid, by way of compromise of the original note. These statements of the appellant Joseph E. Tucker, as a witness, were either contradicted or explained by the deposition in rebuttal of the appellee.

This was all the evidence on the trial, and we can not say therefrom, that the finding of the court was contrary to law, or that it was not sustained by sufficient evidence.

No error was committed, in our opinion, in refusing the appellants a new trial.

The judgment is affirmed, at the appellants' costs.

BESCHER v. THE STATE, EX REL. HAMMANN.

GUARDIAN AND WARD.—Action on Guardian's Bond.—Settlement of Trust.

—*Removal of Guardian.*—An action may be maintained on the bond of a guardian, by the ward, for a breach thereof, before the settlement of the estate or the removal of the guardian.

SAME.—Relator.—Parties Plaintiffs.—A joint and several bond, executed by the guardian of several wards, may be put in suit on the relation of any one of them, without joining the others as relators.

SAME.—Parties Defendants.—Non-Joinder of Surety.—An action on such bond may be maintained without joining the sureties therein as parties defendants.

SAME.—Where, in an action on the relation of one only of several wards, on their guardian's bond, it is alleged that credits allowed to the guardian, in his reports to the court, jointly against all the wards, should have been allowed, not against the relator, but against the other wards, the guardian of the latter may be properly made a party defendant.

SAME.—Mistake.—Negligence.—Account Current.—Receipt.—Answer.—Evidence.—Where, in an action on a guardian's bond, the complaint alleges mistake, negligence and waste on the part of the guardian, resulting in loss to the trust estate, an answer alleging that current settlements, covering

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the matters in issue, had been made by the guardian and approved by the court, prior to his final settlement, is insufficient; and evidence is admissible to show the incorrectness of the vouchers filed with such reports.

SAME.—Acceptance by Guardian of Promissory Note, as Payment of Money due Ward.—A guardian has no right, on settlement with an administrator or other person having funds belonging to the ward, to accept any thing but cash in payment of the amount due to his ward; and if he accept, as cash, a promissory note or other obligation, which proves worthless or is lost in collection, he is liable therefor on his bond.

SAME.—Statute Construed.—Section 114 of *Decedents' Estates' Act*.—Section 114, 2 R. S. 1876, p. 586, of the act in relation to the settlement of decedents' estates, authorizes only an adult legatee or heir, and not the guardian of a minor, to accept a chose in action as a payment.

SAME.—Special Finding of Court.—Proceeds of Real Estate.—Damages.—Liability on Original Bond.—Presumption.—Where, in the special finding of facts by the court, in an action on the original bond of a guardian, the court charges him with "an amount received from the sale of real estate," but it does not appear that such sum was realized from a sale by the guardian of his ward's real estate, and the evidence is not in the record, the Supreme Court, on appeal, will presume in favor of the finding.

SAME.—Non-Joiner of Surety.—The guardian is liable in an action on his original bond, for the proceeds of a sale by him of his ward's real estate, where his surety is not joined with him as a defendant.

SAME.—Exemplary Damages.—Stay of Execution.—Judgment.—Appraisement.—The judgment in an action on the bond of a guardian may include ten per cent. on the amount due the ward, as damages, and may be rendered without stay of execution, or benefit of appraisement laws.

From the Wayne Circuit Court.

C. H. Burchenal and *M. Wilson*, for appellant.

W. D. Foulke and *L. D. Stubbs*, for appellee.

PERKINS, J.—Suit by the appellee, against the appellant, upon a guardian's bond.

The complaint is as follows :

"The State of Indiana, on the relation of Charles Hammann, plaintiff herein, complains of Anton Bescher, the defendant herein, and says, that, on the 1st day of February, 1867, the defendant, together with one Albert Schnurr, made and delivered to the clerk of the court of common pleas of said county their certain writing obligatory of that date, a copy of which, marked 'Exhibit A,' is annexed

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hereto, and thereby bound themselves, jointly and severally, to the State of Indiana, in the penal sum of ten thousand dollars, with the following condition annexed thereto, to wit:

“ ‘If the above bound Anton Bescher will faithfully discharge his duties as guardian of the person and property of Charles Hammann and Louisa Hammann, minor heirs of John W. Hammann, deceased, then the above obligation is to be void, else to remain in full force.’

“ Said bond was accepted and approved by said clerk, and by said court; and after the execution of said bond, and on the same date, letters of guardianship were issued accordingly to said defendant, in pursuance of an order duly made by said court, and the said Anton Bescher duly qualified and took upon himself the burden of his trust as said guardian.

“ The plaintiff says that the above named relator is the Charles Hammann named in said bond, and that said relator, as one of the distributees of the personal estate of the said John W. Hammann, deceased, was entitled to the sum of \$10,000, on the distribution of said estate.

“ 1. And the plaintiff says, that said defendant did not faithfully discharge his duties as guardian of the person and property of said Charles Hammann and Louisa Hammann; that, as to \$4,300 of the same, the said guardian negligently received in payment of the same worthless notes, the names of the makers of which are unknown to the plaintiff and to the relator, except one made by one Henry DuHuy, calling for \$500, dated the 25th day of April, 1865, with interest from date, and another on one Benjamin Hauer and Frederick Paulus, dated November 15th, 1866, for \$100, and another on one Frederick Paulus, dated June 1st, 1865, for \$100, with 8 per cent. interest, and receipted the administratrix of said estate for the same, in full of the amount due the relator, and has failed

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to collect said notes of the makers, and said distributee's share from said estate and from said administratrix. And the plaintiff says that the relator arrived at the age of twenty-one years on the 5th day of December, 1874, and that since that time he has demanded from the defendant payment of all sums due to him from said defendant as said guardian, and that the defendant refuses to account to him for said \$4,300, or any part thereof, and that the same is now due and wholly unpaid to the relator.

"2. And, for further breach of the condition of said bond, the plaintiff says, that there came to the hands of the said defendant, from the distribution of the personal estate of the said John W. Hammann, deceased, as said guardian of said relator and said Louisa Hammann, the sum of \$8,000, and from the sale of the real estate of his wards the further sum of \$4,000; that he blended the two sums together, so that their separate identity has been entirely lost; that he improvidently squandered and wasted \$6,000 of the same, and converted the remainder, in violation of his trust, to his own use, one-half of which sums is now due and owing to the relator, and all and every part of which the defendant refuses to pay over to the relator, although often requested to do so by the relator, since his arrival at the age of twenty-one years.

"3. And, for further breach the plaintiff says, that, as to the sum of \$800, due the relator as a part of the distributive share due to him from the estate of John W. Hammann, deceased, the said defendant neglected to collect the same from the administratrix of said estate, and that by reason of said negligence the same is lost, and that said defendant neglects and refuses to account for the same, or any part thereof, to the relator, although often requested so to do by the relator since he has arrived at the age of twenty-one years.

"4. And, for further breach of the condition of said

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bond, the plaintiff says, that the defendant, as said guardian, after the execution of said bond, received from the administratrix of said estate the sum of \$9,000, being a part of the sum due the relator and the said Louisa Hammann from the said estate, that the said defendant fraudulently, corruptly and negligently paid out large sums of said money belonging to said wards to divers and sundry persons, a bill of particulars of which, marked 'Exhibit C,' is filed herewith, and wasted and squandered said estate, and that he filed his accounts current in the common pleas court aforesaid on the 19th day of May, 1869, and on the 9th day of January, 1871, and at the April term of the Wayne Circuit Court, 1873, which were all approved by the said courts respectively, and to which reference is hereby made; the plaintiff says that the sums paid out for the benefit of Louisa Hammann largely exceed the amount paid out for the benefit of the relator; that all the sums paid out by the defendant for the benefit of the said Louisa, and all those paid out for the sole benefit of the relator, and all those for the joint use and benefit of both said wards, are charged to the said wards jointly, and no separate account has been kept or returned to court; and plaintiff says that large sums have been paid out by the defendant, fraudulently and corruptly and negligently and improvidently and wastefully, to persons the relator nor said defendant as guardian of the relator did not owe, and in excess of the true indebtedness which the relator or defendant as said guardian did owe, and are falsely and fraudulently charged to the relator in said accounts current, and interest thereon, a bill of particulars of which, marked 'Exhibit C,' is filed herewith, and the defendant, though often requested by the relator since he arrived at the age of twenty-one years, refuses to correct said accounts, or pay over to the said relator the sum that is due to him, or any part thereof.

" 5. And, for further breach of the condition of said

bond, the plaintiff says, that the defendant, as such guardian, after the execution of said bond, received from the administratrix of said estate the sum of \$9,000 in money, one bond of the United States of the value of \$1,000, but the particular character, denomination and description of which is unknown to plaintiff, and nine promissory notes, one for \$636, one for \$24, one for \$250, one for \$600, one for \$500, one other for \$100, one other for \$250, one other for \$100, and one other for \$500, and all of the value of \$3,500, including accrued interest thereon, but by whom made, or to whom payable, plaintiff does not know; and which money, bond and notes were received as part of the sum due and owing to the relator from the estate of John W. Hammann, deceased, as a distributee of said estate, and the defendant sold, collected and otherwise disposed of said notes and bonds, and realized therefrom the sum of \$5,000, which sum, together with said \$9,000 in cash, the defendant converted to his own use, in violation of the trust so reposed in him, all of which is due and owing to the relator, and the defendant refuses to pay over the same, or any part thereof, to the relator, though often requested so to do by the relator since his arrival at the age of twenty-one years."

Demurrer to the complaint for want of facts to constitute a cause of action; and, secondly, on account of a defect of parties plaintiffs, in this, that Louisa was not joined as relatrix; and, thirdly, on account of a defect of parties defendants, in this, that said Albert Schnurr is not made a defendant.

The demurrer was overruled, and exception entered.

Answer in six paragraphs:

1. The general denial;
2. Payment;
3. That said "estate remains open and unsettled in said [Wayne Circuit] court, notwithstanding said defend-

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ant has used due diligence, as aforesaid, to have the same settled as aforesaid." Further, it alleges payment.

Counsel for appellant say, in their brief, that the main purpose of this paragraph was to show that there had been no final settlement of the guardianship.

4. That, "as to said sums alleged to have been wrongfully paid by said defendant, as set forth in said 'Exhibit C,' the defendant says, that, after making the payments, he, at divers times, to wit, at the May term, 1869, and the January term, 1871, of the Wayne Court of Common Pleas, and at the April term, 1873, of said Wayne Circuit Court, filed in said courts his several accounts current, under oath, in which he set forth and claimed credit for the said sums as paid, and filed therewith the proper vouchers for the same; and the said courts, after due inspection of said several accounts, approved and passed the same, and ordered and adjudged that the said defendant should be credited with the amounts thereof respectively, which settlements and the said orders and judgments of said court thereon still remain in full force, and no exception has been taken thereto, which said settlements and said orders of court are hereby referred to. Wherefore, as to said sums, the said defendant prays judgment.

5. "That, since his appointment as such guardian, he has rendered services, as such guardian, in behalf of said relator, in the care and management of said estate, and in receiving and paying out the same, and caring for the said relator, which services were reasonably worth the sum of \$800, one-half of which, to wit, \$400, has been reported to and allowed by the court having jurisdiction of said estate, but the residue has not been so reported and allowed and remains unpaid, and all the residue of said estate due said relator has been paid out before the commencement of this suit, partly for and on behalf of said relator during his minority, for the necessary expenses of his mainte-

nance and education and the expenses of administration of the estate, and the residue to him since arriving at his majority.

6. That, "as to the said notes of Henry DuHuy, mentioned in said complaint, the defendant says, that, before his appointment as such guardian, one Susanna Hammann, the mother of said relator, was the administratrix of the estate of John W. Hammann, the father of the relator, and as such had in her hands all the estate coming to said relator, an heir of his said father, and while she held said estate, as such administratrix, she loaned out the money of said estate to divers persons, and amongst others she loaned a portion thereof to the said DuHuy, and took the note referred to in said complaint, with certain sureties thereon; after taking said note the said Susanna, at the instance of said DuHuy and without the knowledge or consent of said sureties, altered the date of said note, so that the same had a longer time to run, which alteration was made by said Susanna in ignorance of the law, she not knowing that the same would in any way impair the liability of said sureties; that afterward, when said Susanna came to settle and turn over said estate to said guardian, she turned over and delivered to said guardian the said notes for money loaned, including said note of said DuHuy, which said notes were so turned over, and were so received by said guardian, with the assent and approval of the Wayne Court of Common Pleas, to which court the said transaction was then and there reported." (No copy of such report appears in the record, or is averred to exist, and it is not shown who made the report.)

"At the time of so receiving said note, said guardian had no notice or knowledge whatever of said alteration, and the parties, both principal and sureties, were then good and solvent, but, by the time the said note became due according to its tenor, and before defendant had any knowl-

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edge of said alteration, the said DuHuy failed and became wholly insolvent; that, at the first term of the court after said note became due, said defendant, as such guardian, brought suit thereon in the Wayne Court of Common Pleas, against said principal and said sureties thereon, and prosecuted the same with diligence, but the said sureties appeared and set up in defence the said alteration of said note without their consent, and, on the trial of the cause, judgment was rendered, in 1865, in favor of said sureties, and they were released, but judgment was rendered against said DuHuy for the principal and interest of said note; that defendant caused execution to be at once issued thereon, which execution was returned by the sheriff 'no property found,' and said judgment remains unpaid, said DuHuy being at all times since wholly insolvent; that said Susanna Hammann, at the time of taking said judgment, and for a long time after, had no property whatever, out of which any part of said claim could be made, but afterward, to wit, in —, 1870, and as soon as defendant had knowledge of any property or means of said Susanna, out of which any part of said claim could be made, he placed the said note and claim in the hands of W. A. Peelle, Esq., an attorney in good repute, for the purpose of collecting against said Susanna; and afterward, to wit, on the — day of —, 1873, said Peelle, as such attorney, in the name of the defendant, brought suit against said Susanna in the Wayne Circuit Court, setting up the facts aforesaid, and claiming judgment against her for the amount of said note and interest; that such proceedings were had in said suit, that said Susanna filed a plea of the statute of limitations, and on final determination of the cause judgment was rendered, in 1874, in favor of said Susanna and against said defendant; that afterward, to wit, at the September term, 1875, of said circuit court, said defendant brought suit against said Peelle, alleging the facts

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aforesaid concerning said note, and that the same had been by defendant placed in the hands of said Peelle for collection against the said Susanna, and that, by and through his negligence in prosecuting the said suit against her, judgment had been therein rendered against said defendant, and the collection of said claim had thereby been defeated, and such proceedings were thereon had, that, at the said September term, 1875, a trial of said cause was had, and judgment thereon rendered in favor of said Peelle and against said defendant. Defendant says that he has, as aforesaid, used due diligence and made every effort to collect said claim, and the same is worthless and insolvent. He says, that, in his inventory as such guardian, and in his settlements made to the court, he charged himself with the amount of said note, and now stands charged therewith, with the interest accrued thereon, amounting to the sum of \$1,000, no part of which ought to be charged against him, and he asks now to be released therefrom, and credited therewith."

Separate demurrers to the second and fifth paragraphs were overruled, and sustained to the third, fourth and sixth, and exceptions reserved.

Reply to the second and fifth paragraphs:

1. General denial ;
2. To the fifth paragraph, payment.

Trial by the court; special finding of facts and conclusions of law thereon; exception.

Motion for a new trial overruled, and judgment for the plaintiff in the sum of ten hundred and ninety-three dollars and fifteen cents, with ten per cent. thereon in damages, making in all twelve hundred and two dollars and forty-six cents.

Exceptions were duly entered.

The bill of exceptions shows that the court admitted

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evidence impeaching some of the vouchers on file, which were given in evidence by the appellant.

At the request of the parties, the court made a special finding of the facts in the case, and of the conclusions of law thereon, as follows, viz. :

“ 1st. That, on the 1st day of February, 1867, said defendant was, by the Wayne Court of Common Pleas, appointed guardian of the estate of said plaintiff and of Louisa Hammann, minor heirs of John W. Hammann, deceased, and that letters of guardianship were issued to him as such; that, on said day, said defendant and Albert Schnurr executed a bond, whereby they bound themselves in the penal sum of \$10,000, conditioned for the faithful performance by said guardian of his duties as such guardian.

“ 2d. That, on the 19th day of November, said guardian filed in the Wayne Court of Common Pleas his first account current, showing the amounts of money in hand as guardian of said minors, and the expenditures he made on behalf of the estate, by which the court finds that he had on said day :

Amount received from sale of real estate, with accrued interest.....	\$3,357.18
Amount received from the administrator of said John W. Hammann's estate, and the accrued interest thereon.....	\$4,820.68
Making a total in the hands of said guardian, due said wards, of.....	<u>\$8,177.86</u>
One-half of which was due to said plaintiff, and that said defendant is chargeable with the amount due said plaintiff on that date.....	<u>\$4,088.93</u>
That of the credit claimed of \$479.89 in voucher 1 of said account current, said plaintiff can be charged with only.....	\$226.82
Interest on this credit.....	\$7.08

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That voucher 2 of said account current was paid for sodding the grave of John W. Hammann, deceased, is not a proper credit to said defendant.	
That voucher 4 of said account was expenditures for plaintiff's schooling in Germany, and is a credit in favor of the defendant.....	\$75.84
Interest on same to date of that account current...	\$6.88
That one-half of vouchers 5, 6, 7 and 8, of said account, is a proper credit in favor of defendant..	\$40.95
Total credits.....	<u>\$357.57</u>
Which, deducted from the amount with which he stands charged, would leave a balance against said defendant, on that date, of.....	<u>\$3,731.36</u>
That, on the 9th day of January, 1871, said defendant filed in the Wayne Court of Common Pleas his next account current; and the court further finds that defendant, at that date, was chargeable with the balance due plaintiff at the first settlement.....	\$3,731.36
Interest from that settlement, January 29th, 1869, to January 9th, 1871.....	\$725.52
Total charges.....	<u>\$4,456.88</u>
Of the credits claimed in said account current, the court finds the following to be proper charges against plaintiff's estate: By one-half of amount paid Grose, succession tax	\$15.00
Interest on same.....	4.26
Amount paid Elizabeth Harbely.....	\$278.44
Interest on same.....	16.24
One-half clerk's costs.....	.92
	<u>\$314.86</u>

"The credits above include no attorney's fees.

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“ While all the attorney fees claimed in the first account current were allowed, the court finds from the evidence that the services of John H. Popp, instead of being of value to the estate of the said wards, have been injurious; and that the second account current, drawn and presented by said Popp, shows, that, while he was acting as an attorney for the estate, he was at the same time acting as an attorney for the largest claimant against the estate. This, the defendant was bound to know, was illegal.

“ Deducting the credits allowed from the charges, it shows a balance due plaintiff's estate, on the 9th day of January, 1871, of \$4,142.02.

“ The court finds that said defendant filed his next account current on the 29th day of April, 1873. The court finds that the \$50.00 paid W. A. Peelle was not for services rendered said estate.

“ In voucher No. 29, \$4.00 was a payment for plaintiff, and defendant is credited with that amount—\$4.00.

“ Voucher No. 30, \$29.19, one-half of which is a proper credit to defendant—\$14.59.

“ The court finds that the attorney's fees allowed by the court were upon a misapprehension of the facts; that from the evidence \$125 would be an ample fee to John H. Popp, for all the service he has rendered, even if it had been beneficial to the estate; as a credit of the half of \$63.50 has already been allowed as against plaintiff, deducting the \$63.50 from \$125 would leave \$61.50, the half of which would be a proper charge against the estate of plaintiff—\$30.75.

“ Guardian's allowance, \$150, one-half of which is chargeable to plaintiff—\$75.00.

Clerk's fees \$2.50, one-half of which is

chargeable to plaintiff.....	1.25
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	<hr style="width: 100%;"/> \$125.59 \$5,096.97
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Deduct credits from charges leaves balance due from defendant to plaintiff's estate, April 29th, 1873,..... \$4,971.38
 Interest on said balance from April 29th, 1873, to 29th day of March, 1876. \$1,449.96
 Amount due, exclusive of credits.....\$6,421.34.

"The court further finds, that, since April 29th, 1873, to April 9th, 1875, the defendant has paid the amounts following, which are proper credits in his favor against the estate of plaintiff, to wit:

Nov. 7th, 1874, taxes \$34.04, one-half to be credited.....	\$17.02
Interest on same to date.	2.42
January 5th, 1875, amount paid W. W. Dudley for plaintiff.....	250.00
Interest on same to date.....	30.02
March 16th, 1874, taxes \$115.15, one-half to be credited.....	57.57
Interest on same to date.....	11.66
January 29th, 1874, taxes \$66.56, one-half to be credited.....	33.28
Interest to date.....	7.19
January 29th, 1875, taxes \$101.14, one-half.....	50.57
Interest to date.....	5.89
April 20th, 1874, taxes \$34.03, one-half..	17.01
Interest	3.31
December 30th, 1874, amount paid W. W. Dudley for plaintiff.....	700.00
Interest to date.....	87.50
December 30th, 1874, amount paid W. W. Dudley for plaintiff.....	1,900.00
Interest to date.....	237.50
February 1st, 1875, amount paid W. W. Dudley for plaintiff.....	1,200.00
Interest on same.....	139.75

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Allowance.....	100.00	
Amount paid plaintiff April 26th, 1875..	437.40	
Interest to date.....	40.10	
	<hr/>	
	\$5,328.19	
	<hr/>	
		\$6,421.34
		<hr/>
“ Amount due plaintiff.....		<u>\$1,093.15</u>

“ And the court further finds, that said plaintiff, before the commencement of this suit, demanded of said defendant that he should make a settlement of his trust as his guardian, and pay to him the balance due him from said defendant, and defendant refused so to do.

“ The court finds, as a conclusion of law, from the above facts, that the plaintiff is entitled to recover of the defendant the sum of \$1,093.15, with damages thereon to the amount of \$109.31, and that the same be collected without stay of execution or benefit of the valuation or appraisal laws of this State.”

Defendant excepted to the conclusion of law.

Motion for a new trial overruled. Exceptions. Appeal.

The errors assigned, on appeal, are as follows:

1. The court erred in overruling the defendant's demurrer to the complaint, and to each paragraph thereof;

2. The court erred in sustaining the plaintiff's demurrer to the third, fourth and fifth paragraphs of the defendant's answer;

3. The court erred in the conclusions of law upon the facts as specially found by the court;

4. The court erred in overruling the defendant's motion for a new trial;

5. The court erred in rendering judgment against the defendant for \$109.31, being ten per cent. damages on the amount found to be due from defendant to plaintiff;

6. The court erred in rendering judgment against the defendant without benefit of valuation or appraisement laws: and,

7. The court erred in ordering said judgment to be collected without stay of execution.

We proceed to consider the errors assigned:

1. The appellant claims that the suit is prematurely brought, that it will not lie till there has been a settlement of the estate, or the guardian removed, and that his sister Louisa, a younger ward of the same guardian, and still a minor, is a necessary party.

All these objections are answered by the case of *Heady v. The State, ex rel., etc.*, 60 Ind. 316, and cases cited. We insert extracts from the opinion in that case:

"It is furthermore claimed by the appellants, that the relator could not maintain an action against the executors upon their bond, until he had procured a judgment, or otherwise exhibited and established his claim against them; and to this point the case of *Eaton v. Benefield*, 2 Blackf. 52, and some earlier Indiana cases, as well as some cases from other States, are cited.

"The case of *Hunt v. White*, 1 Ind. 105, may be cited upon the same point. But the earlier cases in Indiana, to that effect, were overruled by the case of *The State v. Strange*, 1 Ind. 538. See the cases of *The State v. Railsback*, 7 Ind. 634, and *The State v. Hughes*, 15 Ind. 104.

"It is now held, that the statute authorizing such suits dispenses with the necessity of having previously established such claim; and there was no necessity that the executors should have been removed, before bringing the action. *Owen v. The State*, 25 Ind. 371."

The rule on this point, as to suits on administrators and guardians' bonds, is the same.

"It is insisted, that, if the two sons of the testator, Thomas J. Heady and the relator, could maintain an ac-

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tion at all against the executors, for a failure to appropriate the interest on the specified money to their education, the action must be joint, in favor of both of them; and that an action can not be maintained on the relation of one alone.

“We do not think that the right of the two sons was a joint right, but a several one. Perhaps, in some actions, for some purpose, they might have joined; but it is clear, as we think, that their rights were several, in the very nature of the case.” *Colburn v. The State*, 47 Ind. 310.

It may properly be here observed that the guardian of Louisa, the infant ward, was a party defendant to the suit.

If the guardian's accounts have not been so kept as to protect him, he must answer to the wards severally, at the proper time, for the amount due them.

The complaint was sufficient, and the proper parties were made to the suit.

2. Error in sustaining the demurrers to the third, fourth and sixth paragraphs of answer.

What we have said upon the first assignment of error shows that the court did not err in its ruling on the demurrer to the third paragraph of answer. This paragraph is pleaded upon the theory that action can not be brought upon the bond till the estate is settled, etc., or the guardian has been removed.

The fourth paragraph relies upon the current settlements prior to the final settlement, made by the guardian with the probate court, as conclusive in a suit upon his bond, charging mistake, negligence, waste, and loss to the trust estate thereby. Such settlements are not conclusive. *The State v. Wilson*, 51 Ind. 96; *Johnson v. McCullough*, 59 Ga. 212.

These cases decide, also, that there was no error in the admission of the testimony set forth in the bill of exceptions, showing incorrectness in the vouchers in the current settlements of the guardian, prior to the final settlement.

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The sixth paragraph is of the same character. It sets up what we may denominate interlocutory orders, not a final settlement. It also sets up that the appellant received a worthless note from the administratrix of the estate of Hammann, deceased, which note she had taken upon a loan of the money of the estate by her, and which the appellant received without making, so far as appears, any inquiry as to its validity, and charged himself with it as money, and now asks to be credited therewith, as worthless, in his account as guardian, after the time has gone by when the sureties on the bond of the administratrix would be liable for her default.

The court did not err in sustaining the demurrer to this paragraph. Aside from the question of negligence, which seems to be against the defendant (appellant), we are satisfied the appellant violated his duty as guardian in receiving said note, and that he is now liable for its amount in cash. He shows no just cause for being credited with its amount. It was the duty of the administratrix to make final settlement of the estate, and to account for and pay over in cash any surplus remaining after payment of debts, etc. 2 R. S. 1876, p. 543, sec. 137.

But section 114, p. 536, 2 R. S. 1876, provides:

“If, at the time of final settlement, all the claims against such estate, except legacies, be paid, and there remains due such estate any uncollected claim, if any legatee or heir whose share does not exceed the amount thereof will accept it in payment of so much of his share, the same shall be assigned or delivered to him by the executor or administrator, and the estate shall be finally settled.”

The legatee or heir must, of course, be an adult, to enable him to accept; and that action of the court could not validate what the statute did not permit. There is no provision, so far as we are advised, authorizing a guardian to

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take such claims; and, if he does so, he takes them at his risk.

We have authorities on this point.

In *The State v. Womack*, 72 N. C. 397, it is decided, that:

“A guardian is liable not only for what he does receive, but for what he ought to receive; and if he ought to receive a certain amount in money, and does not, but takes something else, his own bond for instance in the place of money, he and his suerties are liable.”

In *Cranford v. Brewster*, 57 Ga. 226, it is decided, that:

“Where an administrator, who was also the guardian of his intestate’s children, charged himself, as guardian, with having received from himself, as administrator, a certain sum in cash, he can not plead and prove, in defence to an action on his bond as guardian, that the amount so charged as cash was in fact made up of notes on divers persons who were solvent at the time, but had since become insolvent, and that with some of the notes he purchased slaves in his own name in order to save the debts, and that such negroes had become valueless on account of emancipation.”

See *Jones v. Jones*, 20 Iowa, 388; 3 Wait’s *Actions & Defences*, p. 539; *Lane v. Mickle*, 46 Ala. 600. In this case it was decided, that:

“A guardian who receives in payment of a solvent debt, due to his ward, the note of a third person instead of money, receives the same at his peril, and if he fails to collect said note, and the maker becomes insolvent, must, on his final settlement, be charged with the amount of the debt, and interest on the same, from the time it was due, although he may have used due diligence to collect said note.”

The court did not err in sustaining the demurrers to the third, fourth and sixth paragraphs of answer.

The guardian is not entitled to be credited in his account with the amount of the worthless note he received

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and charged himself with as cash. He took it at his peril.

4. The court did not err in its conclusions of law upon the facts. The point is here made that the court erred in charging the defendant with the proceeds of the sale of real estate. It is not shown that such proceeds were from the sale of real estate by appellant; and it is only the proceeds of such a sale that the guardian is not chargeable with, in a suit upon his original bond as guardian. *Colburn v. The State*, 47 Ind. 310. The evidence is not in the record. We presume in favor of the action of the court. It is not shown to be erroneous.

The court did not find that the guardian, on his own application as such, sold any real estate, from which he received proceeds.

Further, this suit is against the guardian alone. His surety is not sued. The guardian would probably be liable for this money without the existence of any bond. If he gave a bond on the sale of real estate of the wards, and received the money on such sale, he would be liable on that bond. It is not material to him on which bond he is held liable. No equity calls for a reversal of the judgment in this case. Besides, the guardian may have paid out, for the wards, the amount he received as proceeds of sale of real estate.

5. The court did not err in overruling the motion for a new trial. The evidence is not in the record, and the court committed no error in admitting evidence establishing the incorrectness of the vouchers on file.

6. The court did not err in rendering judgment for ten per cent. on the amount found due, and without relief, etc., *Potter v. The State*, 23 Ind. 607; and without stay of execution. 2 R. S. 1876, p. 552; *Richardson v. The State*, 55 Ind. 381.

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The non-joinder of Schnurr, as a defendant, is not noticed in the brief of the appellant, and is therefore waived.

The judgment is affirmed, with costs.

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128	869

THE DOMESTIC SEWING MACHINE CO. v. ARTHURHULTZ.

PROMISSORY NOTE.—*Sale.*—*Contract concerning Title to Chattel.*—*Assignment.*—*Replevin.*—The endorsement in blank of a promissory note which stipulates that a certain chattel, therein described, shall remain the property of the payee until the note has been paid, does not, of itself, vest the title to such chattel in the endorsee, so as to enable him to replevy such chattel, on demand, for non-payment of the note.

From the Henry Circuit Court.

M. D. Harry, D. W. Chambers and E. Saint, for appellant.

J. Brown, J. M. Brown and L. P. Mitchell, for appellee.

Howk, C. J.—The appellant sued the appellee, in this action, before a justice of the peace in Henry county.

In its verified complaint, the appellant alleged, in substance, that it, the appellant, was the owner and entitled to the possession of one Domestic Sewing Machine, No. 78,129, of the value of forty dollars, of which the appellee had possession without right, and which was unlawfully detained from the appellant by the appellee; and that the same had not been taken by virtue of any execution or other writ against the appellant. Wherefore the appellant demanded judgment for the recovery of said machine, and for five dollars damages for the detention thereof.

The trial of the cause before the justice resulted in a ver-

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dict and judgment in favor of the appellee. On appeal to the circuit court, the cause was tried by the court, without a jury, and a finding was made for the appellee. The appellant's motion for a new trial having been overruled, and its exception saved to such decision, judgment was rendered on the finding.

The only error assigned by the appellant, in this court, is the decision of the circuit court in overruling its motion for a new trial. The causes for a new trial, assigned by the appellant in its motion therefor, were as follows:

1. That the finding of the court was not sustained by sufficient evidence; and,
2. That the finding of the court was contrary to law.

It will be seen, therefore, that the only question presented for decision, in this case, is this: Was there any sufficient evidence in the record to sustain the finding of the court?

As necessary to a proper understanding of this question, and of our decision thereof, we set out the evidence as we find it in the record.

“Plaintiff's evidence:

“M. D. Harry, being duly sworn, says: As agent for the plaintiff, I made a demand on the defendant for this machine in controversy, before the commencement of this suit, and offered to deliver up the note or article of agreement sued on. The machine is worth forty dollars.

“The following article of agreement was then offered in evidence by the plaintiff, as follows:

“ ‘ \$40.00.

APRIL the 25th, 1873.

“ ‘ Six months after date, we promise to pay to the order of Child Brothers the sum of forty dollars, payable at First National Bank, New Castle, Ind., value received. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note. The sewing machine described herein,

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for which this note is given, shall remain the property of Child Brothers until this note is fully paid. No person is authorized to receive a credit upon this note except the holder thereof, and said credit shall be endorsed upon this note at the time of payment.

(Signed,)

““ L. ARTHURHULTZ.

““ Style $\frac{1}{2}$ c. Plate No. 78,129.

““ Due Oct. 25th, 1873.

““ P. O. address, Sulphur Springs. 30,894. Red No. 1,643.’

“ Said article of agreement having upon it the following endorsement, to wit: ‘Child Brothers.’

“ Defendant gave the following evidence, to wit:

“ Leander Arthurhultz, sworn, says:

“ I am the defendant. I gave another note, for the same amount as the one given in evidence by the plaintiff, for the machine in controversy. The price of the machine was eighty dollars. The other note for forty dollars has been fully paid by me and taken up.

“ This was all the evidence in the cause; and upon this evidence the court found for the defendant.”

The entire argument of the appellant’s counsel, in their brief of this cause in this court, is comprised in the following sentence:

“ We don’t think this case needs argument; we therefore refer the court to the following authorities, which fully decide this case.” Then follow a number of cases from our own reports.

We have carefully examined the cases cited by counsel, and it seems to us that those cases do not “fully decide this case.”

It may be considered as settled law, in this State, that, where it is stipulated in a written contract in relation to the sale of personal property, such as the note or article of agreement, as it is called, given in evidence by the appellant, that the property sold shall remain the property of

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the vendor until it has been paid for, the title to such property will not pass to the vendee thereof until such payment has been made. This doctrine is settled by the following authorities, cited by the appellant's counsel, and claimed by them to be decisive of the case at bar, to wit: *Thomas v. Winters*, 12 Ind. 322; *Shireman v. Jackson*, 14 Ind. 459; *Plummer v. Shirley*, 16 Ind. 380; *Dunbar v. Rawles*, 28 Ind. 225; and *Sims v. Wilson*, 47 Ind. 226. The same doctrine is fully considered and adhered to in the more recent case of *Bradshaw v. Warner*, 54 Ind. 58.

It may be conceded, that the appellant's evidence in this case showed that the appellee was not the owner of the sewing machine in controversy; but it would not follow, by any means, from the fact thus shown, either that the appellant was the owner, or that it was entitled to the possession of said machine, either at the commencement of this action or at any time afterward. It seems to us that the appellant's evidence clearly showed that the title to the sewing machine, at least at the time of the trial, was in Child Brothers; and this title, so far as the evidence shows, was not inconsistent with the appellee's possession of the machine. In an action to recover the possession of personal property, it is a good defence to show that the title to the property is in a stranger to the record, where the complaint alleges title in the plaintiff. *Landers v. George*, 40 Ind. 160; and *Thompson v. Sweetser*, 43 Ind. 312.

In the case now before us, it was alleged in the complaint, that the appellant was the owner and entitled to the possession of the sewing machine in controversy. It was necessary that the appellant should sustain this allegation by evidence. There was no evidence introduced by the appellant, on the trial, in support of its ownership or right to the possession of the sewing machine. It is true, that the appellant gave in evidence a note, or, as it is called, an article of agreement, signed by the appellee, but that instrument did not show,

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nor tend to show, that the appellant was the owner, or entitled to the possession, of the sewing machine. On the contrary, as it seems to us, this note showed upon its face that the appellant was not the owner of the sewing machine, but that the title thereto was in third persons, who were strangers to the record of this action; for the note in question contained this clause: "The sewing machine described herein, for which this note is given, shall remain the property of Child Brothers until this note is fully paid." This was the appellee's contract with Child Brothers. The appellee stipulated, and by accepting the note Child Brothers agreed with him, that the sewing machine should remain their property, not until they might endorse the note to some stranger, but "until this note is fully paid." When this action was commenced, it appeared that the note in suit was not fully paid, and therefore it followed, that, by the terms of the note, the sewing machine remained the property of Child Brothers. If it were conceded that Child Brothers might, under the agreement contained in the note, sell and assign to a third person the property reserved to them personally in the sewing machine, which we doubt but do not decide, it seems very clear to us that they did not, by their endorsement in blank of said note, sell and assign their property in said machine to the appellant, and there is no other evidence of any such sale or assignment in the record.

We think that the evidence failed to show that the appellant was the owner and entitled to the possession of the sewing machine in controversy; and therefore we hold, that the court did not err in overruling the appellant's motion for a new trial.

The judgment is affirmed, at the appellant's costs.

MERRICK v. THE STATE.

CRIMINAL LAW.—Indictment.—Murder.—Description of Deceased.—It is not necessary, in an indictment for the murder of a person therein named, to aver that such person was “a human being.”

SAME.—Negative Averment.—In an indictment for murder, wherein death is alleged to have resulted from a mortal wound, made upon the person of the deceased “by cutting” with a purpose to kill and with premeditated malice, it need not be alleged that such wound was not inflicted in performing a necessary surgical operation upon the person of the deceased.

SAME.—Electing between Counts.—Where an indictment contains several counts, each charging the murder of the same person, but in a different manner, the State can not be compelled to elect between such counts.

SAME.—Change of Venue from County.—Judicial Discretion.—Supreme Court.—The Supreme Court will not review the overruling of a motion for a change of venue from the county, where it does not appear from the record that the court had exceeded its discretion.

SAME.—Affidavit for Continuance.—An affidavit for a continuance on account of the absence of a witness should show that due diligence has been used to procure the attendance of the witness, and the time when his attendance can probably be had.

SAME.—Empanelling Special Jury on Special Venire.—The court has power to order a special venire for a special jury to try a defendant, if the business of the court so require.

SAME.—Order of Introducing Evidence.—Judicial Discretion.—It is within the discretion of the court to allow the State, during the introduction of the defendant’s evidence in chief, to call a witness as to original matter.

SAME.—Supreme Court.—Record.—Instructions.—Presumption.—Where the evidence is not in the record, and the instructions given to the jury are not abstractly wrong, the Supreme Court, on appeal, will presume that the instructions were properly given.

SAME.—Refusal to Give Instruction.—In such state of the record, the refusal of the court to give to the jury an instruction asked will be presumed by the Supreme Court to have been right.

SAME.—Murder.—Evidence.—Body of Deceased.—It is not error, on the trial of a defendant indicted for murder, to admit evidence that a body claimed to be that of the deceased is the body of a human being.

SAME.—Possession of Deadly Weapons.—Where an indictment for murder charged the killing to have been caused by the infliction of mortal wounds, it was not error to admit evidence that weapons with which such wounds might have been inflicted were carried by the defendant on the alleged day of the murder.

63	327
130	469
63	327
136	665
63	327
148	249
63	327
154	6

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SAME.—Verdict.—A general verdict of guilty “as charged in the indictment,” returned on an indictment charging the same crime in separate counts, is valid.

SAME.—Venire De Novo.—A *venire de novo* can be awarded only where no judgment can be rendered upon the verdict, in consequence of its imperfection or uncertainty.

SAME.—Arrest of Judgment.—The judgment in a criminal case can be arrested only because the court has no jurisdiction of the case, or because the indictment does not state facts constituting a public offence.

SAME.—Evidence Before Grand Jury.—The prosecuting attorney can not be compelled to furnish the defendant with a copy of the evidence given against him before the grand jury in finding the indictment.

SAME.—Short-Hand Reporter.—Rights of, as to Payment.—Defending as Poor Person.—Judicial Discretion.—Under section 4 of the act of March 10th, 1875, 1 R. S. 1876, p. 770, a short-hand reporter may require payment, or security therefor, of a party demanding a long-hand copy of his notes of the evidence, before proceeding to prepare it; though the court may, in its discretion, admit the defendant to defend as a poor person, and direct that such copy be furnished to him, to enable him to prepare a bill of exceptions.

SAME.—Bill of Exceptions.—It is not error to refuse to admit a copy of the short-hand notes of the evidence into a bill of exceptions.

SAME.—Supreme Court.—The Supreme Court has no authority to direct such short-hand notes to be copied and to order them to be paid for out of the state or county treasury.

SAME.—Error can not be predicated upon the action of the lower court in tying the short-hand notes of the evidence to the record of the cause.

SAME.—Time for filing Bill of Exceptions.—Judicial Discretion.—The length of time to be allowed for the preparation of a bill of exceptions is to be fixed by the court trying the cause, in the exercise of a sound discretion.

From the Marion Criminal Circuit Court.

R. D. Logan, W. P. Adkinson, A. A. Falkenburg and B. F. Davis, for appellant.

T. W. Woollen, Attorney General, *J. B. Elam*, Prosecuting Attorney, and *J. L. Mitchell*, for the State.

BIDDLE, J.—The appellant was indicted for the murder of Julia Merrick, tried, convicted and sentenced to death.

The indictment contains two counts, each count charging murder in the first degree. The first count charges the killing to have been done by administering poison; the second, by inflicting certain mortal wounds.

On motion for a new trial, seventy-two causes were assigned therefor; but, as the evidence, to which the instructions given, and refused to be given, had reference, and upon which the conviction was had, is not before us, but few questions are raised thereby.

Twenty-four assignments of error are alleged in this court, many of which are merely causes for a new trial, and, as assignments of error, present no questions here. Such questions as are properly presented by the record, and discussed on behalf of the appellant, will be noticed in the order of the proceedings.

1. The appellant moved to quash each count of the indictment. His motion was overruled, and he excepted.

The principal ground urged for quashing the indictment was, that it is not averred that Julia Merrick was "a human being." We know of no precedent or form that requires this averment. It was not necessary at common law, nor has it been made so by statute. In the old form, the person killed was described by name, to which was generally added the words, "a reasonable creature, in being, and under the King's peace;" but indictments were not insufficient for want of these additional words. The name imports a human being; that is sufficient.

It is claimed that the second count is bad, because it does not aver that the mortal wound, made by cutting the womb, "was not done in a surgical operation, and that the same was not a necessary operation in protecting and trying to save the life of Julia Merrick." If it was directly averred that the killing was done in performing a surgical operation, if done with a purpose to kill and with premeditated malice, as in this indictment is averred, it would doubtless be sufficient.

These objections have no validity. The indictment is sufficient. 4 Bl. Com. 197; 1 Wharton Precedents, 114, 185.

2. The appellant moved the court to require the State

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to elect upon which count in the indictment the appellant should be tried. The motion was overruled, and exceptions reserved.

There is no error in this ruling. Several felonies of the same class may be joined in different counts in the same indictment, and it is not error to refuse to require the State to elect upon which one the defendant shall be tried. In this case both counts are for killing the same person, differing only in the manner in which the killing was done. There was no necessity to require the State to elect upon which count the appellant should be tried. *McGregor v. The State*, 16 Ind. 9; *Griffith v. The State*, 36 Ind. 406; *Mershon v. The State*, 51 Ind. 14.

3. A motion was made for a change of venue on account of the excitement and prejudice against the appellant in the county. The motion was overruled. The appellant complains of this ruling.

Affidavits were received in favor of the motion and against it. The court considered and decided the question of fact upon this evidence. It was discretionary with the court to deny or grant the motion. It is impossible for this court to say fairly, from the evidence, that a sound judicial discretion was exceeded in the ruling. We can not therefore hold it as error. *Griffith v. The State*, 12 Ind. 548; *Fahnestock v. The State*, 23 Ind. 231; *Anderson v. The State*, 28 Ind. 22; *Morgan v. The State*, 31 Ind. 193; *Clem v. The State*, 33 Ind. 418; *Bissot v. The State*, 53 Ind. 408.

4. The court overruled a motion for a continuance of the case on account of the absence of witnesses, founded on the affidavit of the appellant. He complains of this ruling.

The defect in the affidavit is, that it states that the witnesses reside in the city of Indianapolis, and fails to show proper diligence in having them subpoenaed. The appellant

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was indicted on the 12th day of October, 1878, and did not subpoena his witnesses until the 27th day of November, 1878. The affidavit is also defective in not showing when the attendance of the witnesses can be procured, or whether ever. It does not fulfil the requisites of the statute to obtain a continuance of a cause. 2 R. S. 1876, p. 164, sec. 322. Nor does it come within the decisions of this court. *Hall v. The State*, 8 Ind. 439; *Deming v. Patterson*, 10 Ind. 251; *Mugg v. Graves*, 22 Ind. 236; *McKinlay v. Shank*, 24 Ind. 258; *Ward v. Colyhan*, 30 Ind. 395; *Miller v. The State*, 42 Ind. 544; *Wolcott v. Mack*, 53 Ind. 269; *Beavers v. The State*, 58 Ind. 530; *The Ohio and Miss. R. W. Co. v. Dickerson*, 59 Ind. 317.

5. On motion of the State, the court allowed a special venire to issue for thirty persons to serve as jurors.

To this the appellant objected and excepted.

It does not appear that any of these jurors, if they were summoned, were empanelled in the case we are considering, nor that objection was made and reserved by the appellant to any juror. The court has the power to empanel a special jury whenever the business of the court requires it, and, if done over the objection of the party opposing it, it will not be error. 2 R. S. 1876, p. 13, sec. 3, act of March 7th, 1873; *Evarts v. The State*, 48 Ind. 422; *Winsett v. The State*, 57 Ind. 26.

6. After the State had closed the evidence in chief, and while the appellant was introducing evidence on the part of the defence, the court, over the objections and exceptions of the appellant, allowed the State to call a witness as to original matter on behalf of the State in chief, to which original matter the witness testified.

This ruling falls within the sound discretion of the court. It does not appear but that the appellant had a full and fair opportunity to meet and controvert the testimony of the witness who was thus called; and it does not appear

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that the court, in the exercise of its judgment, exceeded a fair and safe discretion. Such a discretion would have to be clearly exceeded, before an appellate court could interfere with the ruling, and reverse a judgment therefor. *Ferguson v. Hirsch*, 54 Ind. 337.

7. The appellant complains of certain instructions given by the court to the jury.

We have read these instructions; they are not wrong as legal propositions; and, as the evidence in the case is not in the record, we must presume that they were properly given. The court also read portions of the statute as part of the instructions to the jury. This, also, without the evidence before us, must be presumed to have been correct. This question has been repeatedly decided. *Murray v. Fry*, 6 Ind. 371; *List v. Kortepeter*, 26 Ind. 27; *Stull v. Howard*, 26 Ind. 456; *The State v. Frazer*, 28 Ind. 196; *The Columbus, Chicago and Indiana Central R. W. Co. v. Powell*, 40 Ind. 37; *Miller v. Voss*, 40 Ind. 307; *Keating v. The State*, 44 Ind. 449; *The Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Rogers v. Lamb*, 3 Blackf. 155; *Ruffing v. Tilton*, 12 Ind. 259; *Newton v. Newton*, 12 Ind. 527; *The Jeffersonville, etc., R. R. Co. v. Cox*, 37 Ind. 325; *Blizzard v. Bross*, 56 Ind. 74; *Boyd v. Wade*, 58 Ind. 138; *Schoonover v. Irwin*, 58 Ind. 287; *Lewellen v. Garrett*, 58 Ind. 442.

8. The appellant also complains of the refusal to give certain instructions to the jury.

The evidence not being in the record, this ruling must be presumed to be right. The refusal to give instructions to the jury, when the evidence is not in the record, must be presumed to be correct. *Abrams v. Smith*, 8 Blackf. 95; *The State v. Beackmo*, 8 Blackf. 246; *Rogers v. Lamb*, 3 Blackf. 155; *Ruffing v. Tilton*, 12 Ind. 259; *Newton v. Newton*, 12 Ind. 527; *The Jeffersonville, etc., R. R. Co. v. Cox*, 37 Ind. 325; *Blizzard v. Bross*, 56 Ind. 74; *Freeze v. DePuy*, 57 Ind. 188.

Before the case was finally submitted to the jury to consider of their verdict, the counsel for appellant moved to strike out of the record certain evidence touching the character of the body of the deceased and other bodies, which tended to show that they were the bodies of human beings, which evidence had been admitted over the appellant's objection. The ground of the motion was, that the indictment did not describe the deceased as a human being.

We have already held that it was not necessary to aver in the indictment, that the person killed was a human being; it follows, from the reasons there given, that it would not be error to admit evidence that the body of the person killed was that of a human being. The court did not err in admitting the testimony nor in refusing to strike it out.

10. The counsel objected to evidence offered by the State, tending to prove what kind of weapons the appellant carried on the evening before the alleged killing occurred.

We can see no force in this objection. The second count of the indictment charges the killing to have been done by inflicting mortal wounds. Evidence, therefore, that the appellant carried weapons about that time, with which such wounds might have been inflicted, is in the direct line of the averments in the indictment.

11. After the verdict was returned, the counsel moved to discharge the appellant from the crime charged against him in the indictment, for the reason that the verdict is so imperfect that no judgment can be rendered thereon.

The verdict is in the following words:

"We, the jury, find the defendant guilty of murder in the first degree, as charged in the indictment, and that he suffer death therefor. J. W. McVey, Foreman."

The counsel's argument is, that there are two counts in the indictment, and the verdict does not state upon which the appellant was found guilty. He cites the case of *Wein-*

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zorpflin v. The State, 7 Blackf. 186 ; but the authority does not support his argument. That case decides, that, when separate felonies are charged in different counts of the same indictment, a verdict of guilty, expressly confined to one count, is equivalent to a verdict of not guilty on the other counts not mentioned. But a general verdict on one indictment, charging the same felony in two separate counts, is good. Either count of the indictment in the present case will sustain the verdict, which is substantially in the proper form. The court correctly overruled the motion. *Miller v. The State*, 51 Ind. 405 ; *Taylor v. The State*, 49 Ind. 555 ; *Lovell v. The State*, 45 Ind. 550 ; *Enwright v. The State*, 48 Ind. 567 ; *Commonwealth v. Birdsall*, 69 Pa. State, 482 ; Wharton Criminal Law, secs. 3,176 to 3,181.

12. The appellant moved the court for a *venire de novo*. It was denied.

A *venire de novo* is awarded only in a case where no judgment can be rendered on the verdict, in consequence of its imperfection or uncertainty. There is no imperfection or uncertainty in the verdict before us. The court, therefore, properly denied the *venire de novo*. *Boxley v. Collins*, 4 Blackf. 320 ; *Bosseker v. Cramer*, 18 Ind. 44 ; *The Cincinnati and Chicago R. R. Co. v. Washburn*, 25 Ind. 259 ; *Smith v. Jeffries*, 25 Ind. 376 ; *Jenkins v. Parkhill*, 25 Ind. 473 ; *Marcus v. The State*, 26 Ind. 101 ; *Trout v. West*, 29 Ind. 51 ; *Pea v. Pea*, 35 Ind. 387 ; *Gulick v. Connely*, 42 Ind. 134 ; *Housworth v. Bloomhuff*, 54 Ind. 487 ; *Peters v. Lane*, 55 Ind. 391 ; *Whitworth v. Ballard*, 56 Ind. 279 ; *Leeds v. Boyer*, 59 Ind. 289.

13. The appellant moved in arrest of judgment. His motion was overruled. Of this he complains.

A motion in arrest of judgment, in a criminal case, will lie on but two grounds : 1. That the court had no jurisdiction of the case ; 2. That the facts stated do not constitute a public offence. 2 R. S. 1876, p. 409, sec. 144 ;

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Case v. The State, 5 Ind. 1; *Dillon v. The State*, 9 Ind. 408; *The State v. Noland*, 29 Ind. 212; *Vogel v. The State*, 31 Ind. 64; *Mullen v. The State*, 50 Ind. 169; *Buckner v. The State*, 56 Ind. 207; *Meiers v. The State*, 56 Ind. 336; *Veatch v. The State*, 56 Ind. 584; *Shinn v. The State*, 57 Ind. 144; *Hanrahan v. The State*, 57 Ind. 527.

Neither of these grounds exists as to the case before us.

14. A motion, founded on the affidavit of the appellant, to require the prosecuting attorney "to furnish the defendant with a copy of the evidence taken before the grand jury," in finding the indictment, was properly overruled.

We know of no right or law by which the appellant could make such a demand. Indeed, except by authority of law such evidence could not be received for any purpose.

15. The court, under the act of March 10th, 1875, 1 R. S. 1876, p. 770, appointed a short-hand reporter to make a verbatim report of the evidence in the case, who, it appears, performed the services. The appellant moved the court to furnish him with a long-hand copy of the evidence, to aid him in preparing his bill of exceptions; and also moved to be allowed to defend as a poor person, for that purpose

By section 4 of the same act, such reporter may require payment, or the security of payment, for a long-hand copy of his notes, before he proceeds to do the work required of him. This contemplates payment by the party who wants the reporter. The court might, doubtless, order the report made, but is not bound to do so. Nor was the court bound to admit the appellant to defend as a poor person. These are questions depending upon the circumstances of the party, and resting within the sound judicial discretion of the court, and we must presume, nothing appearing to the contrary, that the discretion was properly exercised.

16. The court refused to admit a copy of the short-

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hand notes of the reporter into the bill of exceptions, and thus make it a part of the record. Of this the appellant complains.

This ruling is not erroneous. By a statute of Edward III. passed in the thirty-sixth year of his reign, it was enacted, "that for the future all pleas shall be pleaded, shown, defended, answered, debated, and judged in the English tongue." And this, we believe, has been the law in England ever since, except a short period after the restoration of King Charles. Finally, proceedings at law were required to be "done into English" by a statute of 4 George II. c. 26. The statute of Edward III. requiring legal proceedings to be in the English language is, doubtless, the governing law of this State at the present time upon that subject, except as to certain technical terms which are adopted by the law, and still remain in foreign languages. 1 R. S. 1876, p. 605. The reasons given for these statutes are as sound to-day as they were when the statutes were enacted; namely, "that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause." 3 Bl. Com. 318, 322.

The characters used in stenography can not be said to be in the English language.

A motion has been made in this court, since the case was submitted, "to have the short-hand record copied, and the same paid for by the county of Marion or the State of Indiana." This court has no original jurisdiction over the subject-matter, and no power to grant such a motion.

17. The counsel for appellant complain, in their brief, of "the action of the court in tying the short-hand minutes to the record," after refusing to make them a part of the bill of exceptions; but we can find no such point presented by the record, nor do we suppose a judicial question

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could be raised on any such a state of facts. It was not a judicial act, and if it were, no wrong could come to the appellant thereby ; for the notes, by being tied to the record, do not become a part of it, but remain perfectly useless to the case, and harmless to the appellant.

18. The court refused to give the appellant more than fifteen days within which to prepare his bill of exceptions.

This was a matter of discretion with the court, and does not seem to have been illiberally exercised. Fifteen days, ordinarily, is time enough within which to prepare a bill of exceptions. We can not revise the decision on this point.

We have thus examined and decided all the questions discussed by the counsel on behalf of the appellant. By the record which is before us, we can not see that the appellant was not indicted, arraigned, tried, convicted and sentenced according to the law and the facts of the case ; and, unless we can see by the record that injustice has been done to the appellant, either in law or fact, there is no ground for this court to reverse the judgment.

The judgment is affirmed, at the costs of the appellant.

THE TOLEDO, WABASH AND WESTERN R. W. CO. v. STEVENS.

RAILROAD.—Complaint before Mayor or Justice, for killing Stock.—Defect Cured by Verdict.—Fence.—In an action under the statute, before the mayor of a city, against a railroad company, for killing stock, the complaint alleged, that, “on,” etc, “at a point in said county of * where said railway track was not securely fenced, and not at a public crossing nor within the limits of an incorporated town or city, said defendant, by her agents. * ran a train of cars over and against” the stock of the plaintiff, which was of a certain value, and killed it.

Held, on an assignment of error in the Supreme Court, questioning for the first time the sufficiency of the complaint, that it is good after verdict.

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in an action commenced before a mayor or justice of the peace, though it does not allege that the stock had entered upon the railroad at a point where it was not securely fenced.

SAME.—*Evidence*.—Proof of possession of the stock killed is *prima facie* evidence of ownership.

From the Miami Circuit Court.

W. Z. Stuart, C. B. Stuart and T. A. Stuart, for appellant.

WORDEN, J.—This was an action by the appellee, commenced before the mayor of Peru and afterward appealed to the circuit court, against the appellant, to recover, under the statute, for stock alleged to have been killed on the road of the defendant, at a point where it was not securely fenced.

Trial by the court, finding and judgment for the plaintiff, a motion for a new trial being overruled.

One of the errors assigned is, that the complaint does not state facts sufficient to constitute a cause of action. No point is made on the other assignments of error, except that the evidence did not sustain the finding.

The complaint contained four paragraphs.

The first alleged the killing as follows:

“That, on,” etc., “at a point in said county of Miami where said railway track was not securely fenced, and not at a public crossing nor within the limits of an incorporated town or city, said defendant, by her agents and employees, ran a train of cars over and against one hog of the plaintiff, the property of the plaintiff, of the value of fourteen dollars, and killed it: to the damage of the plaintiff,” etc.

The second charged, that, “on,” etc., “said defendant, by her employees, ran a train of cars over and against one hog, the property of said plaintiff, of the value of sixteen dollars, and killed it, at a point in said county of Miami where said railway track was not securely fenced, and not at a public crossing nor within the limits of an incorporated city or town; to the damage,” etc.

The third alleged the killing as in the second paragraph, and the fourth as in the first.

It is claimed that the complaint was bad, because it did not aver that the animals entered upon the railroad at a point where it was not securely fenced. Had the suit been originally brought in the circuit court, and had the sufficiency of the complaint been tested by a demurrer for want of sufficient facts, the objection would have been fatal. *The Bellefontaine Railway Co. v. Suman*, 29 Ind. 40. But it would seem, that, in an action commenced before a justice of the peace, such complaint would be deemed sufficient. *The Ohio and Mississippi Railway Co. v. Miller*, 46 Ind. 215. We however need not pass upon the question whether the complaint should be deemed good, the action having been commenced before a justice of the peace, or mayor, (which is the same thing so far as this point is concerned,) if there had been a demurrer to it below. No objection whatever was made to it below, but it is attacked for the first time in this court, by the assignment of error first herein noticed. The question arises, whether the defect was not cured by the finding. We think it was.

There can be no doubt, in point of law, that, in order to make a railroad company liable under the statute for stock killed upon the road, the animals must enter upon the road at a point where it is not securely fenced. See the cases above cited. But after verdict or finding it will be presumed that the necessary proof was made. There are numerous cases in our reports which sustain this view. It will be sufficient to refer to the following: *Alford v. Baker*, 53 Ind. 279; *Eigenmann v. Backof*, 56 Ind. 594; *The Louisville, etc., R. W. Co. v. Spain*, 61 Ind. 460.

The only point made in respect to the evidence is, that it does not show that the plaintiff was the owner of the animals, hogs, killed. This was sufficiently shown. It appeared that the plaintiff, with his men, was driving a

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lot of hogs along a road, when some of them escaped through a gap in the railroad fence, and went upon the track. The plaintiff and his men pursued them and tried to get them back, but before they could do so a train came along and killed some of them. The possession of the hogs by the plaintiff was *prima facie* evidence of his ownership thereof.

There is no error in the record.

The judgment below is affirmed, with costs.



THE LOUISVILLE, NEW ALBANY AND CHICAGO R. W. Co.
v. CAHILL.

RAILROAD.—*Killing Stock.*—*Defence.*—*Contributory Negligence.*—Contributory negligence is no defence to an action under the statute, against a railroad company, for killing stock at a point on its road not securely fenced.

SAME.—*Stock Running at Large in Violation of City Ordinance.*—An answer in such action, that the plaintiff had negligently, or in violation of a city ordinance, allowed the stock killed to run at large within the limits of an incorporated city, and in the vicinity of the defendant's railroad, amounts only to an answer of contributory negligence, and is insufficient on demurrer.

From the Putnam Circuit Court.

D. R. Eckels, for appellant.

D. E. Williamson and *A. Daggy*, for appellee.

NIBLACK, J.—This was a suit by George Cahill, against the Louisville, New Albany and Chicago Railway Company, for killing two horses at a point on the line of the defendant's railway, at which it was not securely fenced.

The defendant answered in three paragraphs:

1. The general denial;
2. That the plaintiff turned his said horses loose upon

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the streets, highways and unenclosed commons in and about the city of Greencastle, without any care or control over such horses, in violation of an ordinance of said city, by reason of which said horses wandered and strayed upon the defendant's railway track and were killed, without any negligence on the part of the defendant, such killing being the result of gross negligence on the part of the plaintiff;

3. That the defendant's road passes through a portion of the city of Greencastle, where the plaintiff resides, and that the plaintiff voluntarily turned the horses loose near said road, and permitted them go upon and remain on said road, where engines and cars were passing and repassing, by means of which the horses were run over and killed, being the result of gross negligence on the part of the plaintiff, and without the fault of the defendant.

Demurrers were sustained to the second and third paragraphs of the answer.

There was a trial, a verdict for the plaintiff, and judgment on the verdict.

Errors are only assigned upon the decisions of the court sustaining the demurrers to the second and third paragraphs of the answer.

It has been frequently decided by this court, that, where a railroad company is sued for killing animals at a point on its road where it might be, but is not, securely fenced, contributory negligence is no defence to the action. *The Toledo, etc., R. W. Co. v. Cory*, 39 Ind. 218; *The Toledo, etc., R. W. Co. v. Cary*, 37 Ind. 172; *The Jeffersonville, etc., R. R. Co. v. Ross*, 37 Ind. 545; *The Toledo, etc., R. W. Co. v. Weaver*, 34 Ind. 298; *The Jeffersonville, etc., R. R. Co. v. O'Connor*, 37 Ind. 95; *The Cleveland, etc., R. W. Co. v. Crossley*, 36 Ind. 370; *The Bellefontaine R. W. Co. v. Reed*, 33 Ind. 476; *The Indianapolis, etc., R. R. Co. v. Parker*, 29 Ind. 471.

The second and third paragraphs of the answer before

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us were but answers of contributory negligence in different forms.

The court, therefore, did not err in sustaining the demurrers to those paragraphs.

The case does not fall within the rule laid down in the case of *Knight v. The Toledo, etc., R. W. Co.*, 24 Ind. 402, as in that case, it was held that the defence amounted to more than contributory negligence. See, also, *The Jeffersonville, etc., R. R. Co. v. Dunlap*, 29 Ind. 426.

The judgment is affirmed, with costs.

THE JEFFERSONVILLE, MADISON AND INDIANAPOLIS R. R. Co.
v. FOSTER.

RAILROAD.—*Negligent Killing of Stock.—Contributory Negligence.—Degrees of Negligence.—Instruction.*—In an action against a railroad company, for the alleged negligent killing of stock belonging to the plaintiff, by the defendant's employees, the court instructed the jury, that, to constitute contributory negligence on the part of the plaintiff, in allowing said stock to run at large, he must have knowingly suffered his stock to *habitually* run at large in the immediate vicinity of the place where it was killed; and that the plaintiff "can not recover, although he may have been guilty of *less* negligence" than the employees of the defendant.

Held, that the instruction was erroneous.

From the Johnson Circuit Court.

T. W. Woollen, G. M. Overstreet and A. B. Hunter, for appellant.

S. P. Oyler, F. S. Staff and L. Short, for appellee.

BIDDLE, J.—Action before a justice of the peace, by the appellee, against the appellant, for killing his mare and colt, by running a locomotive and train of cars against and over them upon the railroad track of the appellant. The case

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was appealed from the judgment of the justice to the circuit court, wherein the complaint, consisting of two paragraphs, was amended, and a demurrer to each paragraph overruled, to which ruling exceptions were reserved.

Answer, trial by jury, verdict and judgment for the appellee.

A motion for a new trial and a bill of exceptions present the rulings of the court in giving and refusing to give instructions to the jury.

Over the objections and exceptions of the appellant, the court instructed the jury as follows:

"3. If the plaintiff knowingly permitted his mare and colt to habitually run at large in the immediate vicinity of the place where they were killed, and where he knew that trains of cars were running daily, he was guilty of such negligence as would prevent his recovery on the first paragraph of the complaint. It is not a question which was the more negligent; if the company's servants ran their train in a careless and negligent manner, and the defendant did an act which contributed to the injury, such as knowingly suffering his stock to habitually run at large in the immediate vicinity of the place where they were killed, he can not recover, although he may have been guilty of less negligence than the company's servants."

This instruction is wrong. It was applied to a paragraph of the complaint, which charged the killing by negligence, and the question under that paragraph was one solely of negligence. The instruction tells the jury, that, to constitute negligence on the part of the appellee, and prevent his recovery, he must have "knowingly suffered his stock to habitually run at large in the immediate vicinity where they were killed." The appellee might have been habitually negligent, but not negligent at the given time; if so, he might recover. Or he might not have been habitually negligent, yet negligent at the given time; if so,

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and his negligence materially contributed to the injury, he could not recover.

The instruction also tells the jury, that the appellee "can not recover, although he may have been guilty of less negligence than the company's servants." This implies that he may be guilty of some negligence and still recover. Negligence on the part of the appellee need not to have been habitual, nor need it have any degree of comparison with the negligence of the appellant, to prevent his recovery. If he was guilty of any act of negligence, in any degree, which materially contributed to the injury complained of, he can not recover, although his negligence was less in degree than the negligence of the appellant, which caused the injury.

The judgment is reversed, at the costs of the appellee; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

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SUPREME COURT.—*Assignment of Error.*—*Special Finding.*—Where an exception has been duly taken to the conclusions of law drawn by a court from its special finding of the facts in a cause, an assignment of error on appeal to the Supreme Court, which in legal effect, though informally, questions the correctness of such conclusions of law, is sufficient.

SAME.—*Effect of Exception to Conclusions of Law.*—An exception to the conclusions of law admits that the facts have been fully and correctly found.

FUGITIVE FROM JUSTICE.—*Constitution and Laws of the United States.*—*Habeas Corpus.*—Section 7 of the act of March 9th, 1867, 2 R. S. 1876, p. 421, in relation to fugitives from justice, expressly authorizes, and neither section 2 of article 4 of the Constitution of the United States, nor section 5278 of the Revised Statutes of the United States, forbids a court of this State to inquire whether or not the person charged really is a *fugitive* from justice.

63	344
136	321
63	344
137	265
138	130
63	344
141	545
63	344
188	5718n

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SAME.—Governor's Requisition.—Arrest and Surrender of Fugitive.—The mere recitals contained in the requisition of the Governor of another State, upon the Governor of this State, for an alleged fugitive from justice, are not sufficient of themselves to authorize the arrest and surrender of the alleged fugitive.

SAME.—Who is not a Fugitive.—One who, at, and continuously after, the alleged time of the commission of a crime by him in another State, has been within this State, is not a "fugitive from justice."

From the Newton Circuit Court.

G. W. Plummer and *J. T. Saunderson*, for appellant.

J. R. Troxell, *P. H. Ward*, *C. H. Test*, *J. Coburn* and *E. Bassett*, for appellee.

Howk, C. J.—This was an application by the appellee, James O. Aveline, to the Newton Circuit Court, for a writ of *habeas corpus*.

In his verified complaint, the appellee alleged, in substance, that he was then in the custody of the appellant, George A. Hartman, and was illegally and wrongfully restrained of his liberty by the appellant, in the town of Kentland, in Newton county, Indiana, on an alleged requisition from the Governor of the State of Illinois to the Governor of the State of Indiana:

"1. Because said petitioner is not and was not a fugitive from justice, from the State of Illinois to the State of Indiana, at the time of committing the alleged crime;

"2. Because there is no sufficient charge against the said petitioner, either by the laws of Indiana or Illinois, specified in said alleged requisition;

"3. Because there is no properly authenticated charge against said petitioner;" and that he, the appellee, was sick and afflicted with the disease of rheumatism, so much that he could not walk, nor dress himself, or undress, without the assistance of some one of his family, and needed the constant attention of his physician and of his family, and could not, at that time, be removed without danger to his health.

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Upon this verified complaint, the court awarded a writ of *habeas corpus*, addressed to the appellant, to which writ the appellant made return under oath, in substance, that he had the custody of, and restrained, the appellee at said Newton county, upon a charge of obtaining goods under and by false pretences in writing, and as agent and messenger of Shelby M. Cullom, Governor of the State of Illinois, and by virtue of an order of arrest and warrant, issued under the hand of the Hon. James D. Williams, Governor of the State of Indiana, and the seal of said State, directed to the sheriff of any county in said State, copies of which appointment and order of arrest were attached to and made parts of said return; that the appellee, who was the identical person named in said warrant and order of arrest, was arrested on December 18th, 1878, by the sheriff of Newton county, Indiana, by virtue of said order of arrest, and, upon a hearing before the judge of the Newton Circuit Court, was delivered to the appellant, as said messenger, by order of said judge, and the appellant had receipted to said sheriff for said appellee; copies of said sheriff's return to the order of said judge and of the appellant's receipt were attached to and made part of said return; and that, by virtue of said appointment, order of arrest and order of said judge, the appellant then held possession of the appellee, the person named in said writ of *habeas corpus*, and in obedience to the command of said writ he then produced the body of the appellee in the court below, before the judge thereof, to do and receive what might be ordered concerning him.

To this return, the appellee replied under oath, denying that he was a fugitive from justice, and alleging, among other things, that he was not in the city of Chicago, nor in the State of Illinois, at the time the crime charged against him was alleged to have been committed, nor had he been in said city or State for five years before, nor at any time since that time.

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By agreement of the parties, the cause was tried by the court; and an opinion in writing having been rendered by the court, to the effect that the appellee should be discharged, the appellant excepted to this decision. It was then agreed by the parties that said written opinion should be made a part of the record of this cause, without a bill of exceptions, and that it should take the place of, and be considered as, a special finding of facts with the conclusions of law thereon; and, accordingly, it was so ordered by the court.

We set out this written opinion, as follows:

“This is an application for a writ of *habeas corpus*. The facts are as follows:

“On the 18th day of December, 1878, the Governor of this State issued a warrant under his hand and the seal of the State, directed to any sheriff or constable.

“The warrant recites that the Governor of Illinois has, by requisition directed to the Governor of this State, demanded that James O. Aveline be arrested as a fugitive from justice of the State of Illinois, and delivered to George A. Hartman, the agent appointed by the Governor of Illinois to receive said Aveline. The warrant contains a copy of the criminal charge made against said Aveline, which is embraced in an affidavit sworn to before a justice of the peace in Chicago, to the effect that said Aveline did, in Cook county, in the State of Illinois, on August 30th, 1878, by means of certain false and fraudulent representations and pretences, made in writing and signed by said Aveline, of his own responsibility and wealth, obtain from Stitlauer Brothers & Co. credit, and did then and there obtain of said parties goods, merchandise, etc., of the value of \$727.55. The warrant commands the officer to arrest said Aveline, and to bring him forthwith before a circuit judge for identification, and, upon his identity being established, that he be then delivered to said agent to be transported

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to the State from which he has fled. This warrant came to the hands of the sheriff of this county on Saturday. He arrested said Aveline, and the latter, being brought before the judge of this court, admitted that he was the person named in the warrant; whereupon the judge made an order directing the sheriff to deliver said Aveline to said agent, which was done. In that proceeding, no evidence was introduced or offered, nor was the fact in any way brought to the attention of the judge, that said Aveline was in this State, and not in Illinois, at the time of the alleged commission of the crime charged against him. After his delivery to the agent (the defendant in this case), said Aveline applied to this court for a writ of *habeas corpus*. The defendant made a return of the writ, accompanied by copies of the papers under which he restrains the plaintiff of his liberty. In the trial of the case, after the return of the writ, it appeared clearly in evidence, that Aveline, at the time of the alleged commission of the crime charged against him, was in the town of Kentland, Indiana, where he has resided eight or ten years last past, that he has not been in the State of Illinois for four years, nor in the city of Chicago for eight years. Under the facts thus stated, the question is presented, whether Aveline is legally in the custody of said Hartman, as agent of the State of Illinois, to be transported to that State for trial, under the charge made against him. One clause of section 2, article 4, of the constitution of the United States, reads: 'A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.'

"The extradition law of the United States, sec. 5278, R. S. of U. S., prescribes the mode of proceeding under the constitutional provision quoted. This proceeding relates

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to the case of a person fleeing from the state or territory in which he is charged with crime, to another state or territory. To authorize the removal of a person to another state or territory, upon the requisition of the executive authority of such state or territory, it seems necessary, first, that such person must be charged with the commission of a crime in such state or territory; and, secondly, that he must have fled therefrom to another state or territory.

In a proceeding like the present, the question whether Aveline did or did not, in fact, commit the crime charged against him, can not be tried. *Nichols v. Cornelius*, 7 Ind. 611; *Robinson v. Flanders*, 29 Ind. 10. But the fact can be tried, whether or not he is charged with a crime in Illinois, for, without such charge, the Governor of that State has no legal right to make requisition for him upon the Governor of this State. The fact that such charge has been made is *prima facie* (perhaps conclusively, so far as this case is concerned,) shown by the recitals and the copy of the affidavit contained in the Governor's warrant.

"Being found in this State, in the absence of other proof, Aveline would *prima facie* be a fugitive from the justice of Illinois; but I think he is only *prima facie* so, and that it may be shown, as a matter of fact, that he was not in Illinois, but at his home in this State, at the time of the alleged commission of the crime charged against him.

"It may be assumed, that the State of Illinois has a statute similar to ours, in relation to the commission of crime in that State by persons at the time outside of the State; and it may further be assumed, for the purposes of this case, that the crime charged against Aveline, although perpetrated in Cook county, Illinois, was committed by him while he was at his home in Kentland, Indiana; still this does not, in my opinion, bring the case within the constitutional provisions in reference to the extradition of fugitives from justice. In other words I think the constitutional provi-

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sion, and the act of Congress upon the subject, relate only to persons who are personally present in the state or territory when the crime is alleged to have been committed, and who flee thence to another state or territory.

“ If the law does not provide for a case like the present, it is an omission which the courts can not supply. Statutes, and even constitutions, in restraint of personal liberty, must be strictly construed. They can have no application beyond their plain meaning.

“ I find that the construction thus placed upon the constitution and laws of the United States, respecting the extradition of fugitives from justice, is in harmony with that placed upon the same by our own Legislature, the members of which are bound by an official oath, the same as myself.

“ Section 7 of ‘An act to regulate the arrest and surrender of fugitives from justice from other states and territories,’ approved March 9th, 1867, 2 R. S. 1876, p. 422, reads: ‘No citizen or resident of this State shall be surrendered under pretence of being a fugitive from justice from any other state or territory, where it shall be clearly made to appear to the judge holding the examination provided for by the second section of this act, that such citizen or inhabitant was in this State at the time of the alleged commission of the offence, and not in the state or territory from which he is pretended to have fled, and in such case the judge holding the examination shall discharge the person arrested, and forthwith report the facts to the Governor.’

“ Finding, as I do, therefore, that there is no legal cause for the restraint of the petitioner, Aveline, an order will be made for his discharge.

(Signed,)

“ E. P. HAMMOND, Judge.

“ December 20th, 1878.”

The appellant excepted to the conclusions of law, and the court rendered judgment for the discharge of the ap-

pellee from the appellant's custody, and from this judgment this appeal is now prosecuted.

In this court the appellant has assigned, as errors, the following decisions of the circuit court:

1. In hearing testimony and inquiring into the facts behind the appellant's return to the writ of *habeas corpus*, the appellee having already been identified;

2. The court had no jurisdiction to inquire as to the whereabouts of the appellee, at the time of the alleged commission of the crime charged;

3. The court erred in holding that the appellee was not a fugitive from justice, from the State of Illinois;

4. That no sufficient cause was shown for discharging the appellee from the appellant's custody, and the court erred in granting a discharge.

The appellant has not assigned as error, in express terms, that the court erred in its conclusions of law upon the facts found, though, perhaps, the third and fourth alleged errors are equivalent to such an assignment. By excepting to the court's conclusions of law, the appellant, in legal effect, admitted that the facts were fully and correctly found by the court, but that it had erred in applying the law to those facts: *Cruzan v. Smith*, 41 Ind. 288; *Curry v. Miller*, 42 Ind. 320; *Lynch v. Jennings*, 43 Ind. 276; *Wharton v. Wilson*, 60 Ind. 591. In this case, the controlling facts found by the court were, that, for a long time before, and at the time of, the alleged commission of the crime charged against him, and at no time since, the appellee had not been within the State of Illinois; and that, as to that crime, he had not fled from the State of Illinois, nor to this State, where he had resided for eight or ten years last past; and that, as to that crime, he was not, and could not have been, a fugitive from the justice of the State of Illinois. It is claimed, however, by the appellant's counsel, as we understand them, that the court below had no jurisdiction, un-

der the constitution of the United States and the act of Congress pursuant thereto, to inquire and decide whether or not the appellee had fled from the State of Illinois to this State, or whether or not the appellee was in fact a fugitive from the justice of the State of Illinois, as to the crime charged against him.

Section 2 of article 4 of the constitution of the United States, as we construe its provisions, does not forbid such inquiry and decision by the state courts; nor is there any such prohibition in section 5278 of the Revised Statutes of the United States, which section contains the legislation of Congress on the subject of the extradition of fugitives from justice, as between the different states and territories. Section 7 of the statute of this State in relation to the arrest and surrender of fugitives from justice, which section is set out at length in the special finding of Judge Hammond, *supra*, expressly authorized the proceedings had, and the decision made, in this case.

In the affidavit upon which the Governor of the State of Illinois issued his requisition upon the Governor of this State, for the arrest and surrender of the appellee, it was not charged, that the appellee had fled from the State of Illinois to this State, or that he was a fugitive from the justice of the State of Illinois; nor was it alleged in the appellant's return to the writ issued in this case, that the appellee had so fled, or that he was such fugitive, or that the appellant held him in custody as such fugitive. It seems to us that a citizen ought not to be arrested and surrendered to the authorities of another state or territory, as a fugitive from justice, without some better foundation for his arrest and surrender than the recitals in a governor's requisition. *Ex parte Joseph Smith*, 3 McLean, 121. In Hurd on Habeas Corpus, 2d ed., p. 612, it is said: "There must be an actual fleeing from justice, and of this the governor of the state of whom the demand is made as

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well as of the state making it should be satisfied. This is commonly shown by affidavit." 6 Am. Jurist, 226; Lewin Crown Cases, 266; *In re Adams*, 7 Law Rep. 386; *Ex parte Manchester*, 5 Cal. 237.

In conclusion, we hold that no error was committed by the circuit court in its conclusions of law upon the facts found in this case.

The judgment is affirmed, at the appellant's costs.

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127	26
63	353
147	378

CRIMINAL LAW.—Duty of Coroner Holding Inquest.—Testimony Must be in Writing.—Where a coroner of this State is holding an inquest upon the body of a decedent "supposed to have come to his death by violence or casualty," it is his duty, under the provisions of sections 8 and 9 of the act of May 27th, 1852, "prescribing the powers and duties of coroners," 2 R. S. 1876, p. 20, to cause all testimony given before him by witnesses to be reduced to writing, and subscribed by them respectively.

SAME.—Presumption.—Parol Evidence as to Testimony Before Coroner.—Impeaching Witness.—Murder.—The law conclusively presumes, that, in such case, the coroner has duly performed his whole duty, by causing all of such testimony to be reduced to writing; and, unless the proper foundation be laid for secondary evidence, parol evidence of the testimony given before the coroner, by any such witness, is inadmissible, even to impeach evidence given by him as a witness on the trial of a defendant indicted for the murder of the person over whose body such inquest was held.

SAME.—When Defendant's Evidence before Coroner is Admissible.—Where the defendant in such case has testified in his own behalf, the written statement of evidence given by him as a witness on such inquest is admissible in evidence to contradict him.

From the Vanderburgh Circuit Court.

P. Maier, J. A. Coleman, J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellant.

T. W. Woollen, Attorney General, and *J. Brownlee*, Prosecuting Attorney, for the State.

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NIBLACK, J.—This was a prosecution for murder in the first degree.

George Woods, the defendant below and appellant here, was indicted for killing Millie M. Hobbs, on the 15th day of July, 1877.

The jury, to which the cause was submitted for trial, returned a verdict, finding the defendant guilty of murder in the second degree, and fixing his punishment at imprisonment in the State's prison during his natural life.

After considering and overruling a motion for a new trial, the court rendered a judgment of conviction against the defendant upon the verdict.

The evidence showed that the deceased, with her husband, James D. Hobbs, occupied one portion, and one Alice Manley, a courtesan, occupied another portion, of a double tenement house on Eighth street, between Vine and Sycamore streets, in the city of Evansville; that the defendant, who was a frequent visitor of Miss Manley's, and who had spent the forenoon with her, returned to her house at somewhere from five to six o'clock in the afternoon of Sunday, July 15th, 1877, in a drunken and disageeable condition, and remained there until near the time at which the deceased was killed; that after a while Dan Groves, an acquaintance of defendant's, dropped in at Miss Manley's, and, by some time after eight o'clock, Mrs. Hobbs and two or three other persons had also assembled at Miss Manley's house, Mrs. Hobbs being on friendly and familiar terms with Miss Manley, and accustomed to being frequently in her house; that the defendant had, in the meantime, become offended with Miss Manley about some trivial matter, and was flourishing a knife in his hand, in a rather reckless and menacing manner, saying that Miss Manley would have to kill him or else he would kill her; that, about that time, one Frank Marsh, also a suitor of Miss Manley's and a rival of the defendant's, came in, and, perceiving the

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situation, gave the defendant a kick over the left eye, from which blood flowed quite freely ; that Grover then took the defendant out into the back yard, and left him, as he testified, near an appletree, Marsh and Miss Manley locking the back door after them ; that, after Groves and the defendant went out, the company dispersed, Marsh and Miss Manley going out to take a walk, and Mrs. Hobbs stopping somewhere near the front door, where there was little if any light ; that, at that time, Mrs. Hobbs' husband was sitting by himself in a chair near the yard fence, fifteen or twenty feet from the house ; that, in a very few minutes after Marsh and Miss Manley had gone upon the street, Mrs. Hobbs was heard to give two or three screams, and, when persons began to assemble, she was in her husband's arms, both bespattered with blood, she speechless and gasping, only living a few minutes afterward ; that the husband, seemingly overwhelmed by the sudden death of his wife, first told one witness that Marsh or Morris had killed her, and not long afterward told another witness that the defendant had killed her ; that an inquest was held over the body of the deceased the next day, on which occasion the defendant, Dan Groves, Alice Manley and others testified as witnesses before the coroner's jury, and their testimony was taken down in writing and returned with the verdict of the jury, which was that the deceased came to her death by reason of a stab on her body, inflicted with a knife.

The defendant was arrested at his boarding house, the same night of the alleged murder.

On the trial, Hobbs, the husband, testified, among other things, that, when his wife screamed, she threw up her arms and rushed towards him, saying, " Jim, George " (the defendant) " has killed me ! "

In his testimony on the trial, the defendant denied the killing, saying, that, after he was put into the back yard, he went out onto one of the streets, through the alley, and never afterward saw the deceased while alive.

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The prosecution was conducted against the defendant, upon the theory that he, after being taken into the back yard, found his way by some means to the front part of the house, where he purposely killed Mrs. Hobbs, supposing her to be Alice Manley.

The defence was based upon the theory that it was the husband of Mrs. Hobbs who killed her, relying upon some evidence tending to prove that the relations between her and her said husband had become disagreeable and somewhat threatening, on account of the associations into which she had fallen.

No witness pretended to have seen the fatal blow struck, and the evidence tending to sustain the respective theories of the parties was entirely circumstantial.

There was a conflict in the evidence as to many of the circumstances relied upon by each party; as a consequence the credibility of several of the witnesses became material questions upon the trial, and amongst those the credibility of whose testimony was attacked were Miss Manley, Dan Groves and the defendant, who testified as witnesses for the defendant.

In rebuttal of the defendant's evidence, and touching such questions of credibility, Michael Mackedon, one of the jurors upon the inquest, was introduced as a witness, and, over the objection of the defendant, testified as to his recollection of what Alice Manley, Dan Groves and the defendant respectively had said, regarding certain matters in controversy, in their examinations before the coroner's jury.

The court, also, in rebuttal, permitted Christ. Schmidt, another of the jurors upon the inquest, over the objection of the defendant, to testify as to his recollection of what Dan Groves and the defendant had stated concerning such matters in controversy, in their said respective examinations before the coroner's jury.

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The court, in further rebuttal, also permitted John Deacon, another of the jurors at the inquest, over the objection of the defendant, to testify as to his recollection of what Dan Groves had stated in his examination before the coroner's jury, as above set forth.

The defendant's objection to the testimony of Mackedon, Schmidt and Deacon, given as above, was based upon the ground that parol evidence was not admissible to show what Alice Manley, Dan Groves and the defendant, or either of them, had sworn to before the coroner's jury, when it appeared that their testimony before that jury had been taken down in writing.

The act prescribing the powers and duties of coroners, and providing for holding inquests upon the bodies of persons supposed to have come to their death by violence or casualty, enacts, that "All persons desirous of being heard, shall be examined as witnesses, and the coroner may cause witnesses to be summoned by subpoena issued by him, * * * who shall answer all questions asked them on oath, touching such death." Also, that "All testimony shall be in writing, subscribed by the witnesses," etc. 2 R. S. 1876, p. 21, secs. 8 and 9.

In volume 1, sec. 227, of Greenleaf's Evidence, it is said, that "As the statutes require that the magistrate shall reduce to writing the whole examination, or so much thereof as shall be material, the law conclusively presumes, that, if any thing was taken down in writing, the magistrate performed all his duty by taking down all that was material.

* * * And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty, and oral evidence will be rejected." 2 Phillipps Evidence, 966; Starkie Evidence, 229, 651; *Regina v. Weller*, 2 Car. & K. 223; *Rex v. Fearshire*, 1 Leach, 3d ed., 240; *Hinxman's Case*, 1 Leach, 3d ed., 349, note a.

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The rule, that parol evidence can not be given of any matter which has been reduced to writing, unless the writing can not be introduced, is too well established to require the citation of authorities to sustain it.

Having in view the authorities above cited and the principles which they enunciate, we are constrained to hold that the court erred in permitting Mackedon, Schmidt and Deacon to testify as they did, as to what was sworn to before the coroner's jury.

It is insisted by counsel that what was testified to by the defendant before the coroner's jury was not admissible against him in any way, or for any purpose, and authorities are cited to sustain that position, but we think those authorities are not applicable to cases where defendants in criminal cases are permitted to testify, and do testify in their own behalf. When a defendant testifies, his testimony is subject to the same tests as are applicable to other witnesses.

In a case so closely contested, and resting so much upon circumstantial evidence, and at the same time of so much importance as the one before us, we feel it our duty to apply to it the essential rules of evidence with reasonable strictness, in our review of the proceedings below.

Other questions are discussed by counsel, but, as the judgment must, at all events, be reversed, we have not considered them.

The judgment is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for the return of the prisoner.

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129	275

RUSCHAUP v. CARPENTER.

SUPREME COURT.—*Appeal.—Bond.—Stay of Execution.—Supersedeas.*—An appeal will lie to the Supreme Court without filing an appeal bond, but such appeal will not stay execution.

SAME.—*Requiring New Bond, on Insolvency of Surety.*—Where the security on the bond given on appeal to the Supreme Court becomes worthless, that court may, on proper evidence of that fact, order a new bond to be filed, within a reasonable time, and that, in default thereof, execution may issue.

SAME.—*Weight of Evidence.*—The Supreme Court, on appeal, will not disturb a verdict on the mere weight of evidence.

From the Marion Superior Court.

J. T. Dye and *A. C. Harris*, for appellant.

G. H. Chapman, *U. J. Hammond* and *J. J. Hawes*, for appellee.

PERKINS, J.—The transcript on appeal of this case to this court was filed on the 7th of August, 1877. On the 28th of January, 1878, an affidavit that the security on the appeal bond had become worthless was filed, and, on notice and motion, it was ordered that a new bond be filed within twenty days. A new bond has not been filed. For default of the appellant in complying with said order, it is now adjudged that the bond filed on the taking of the appeal shall cease to longer operate as a stay of execution on the judgment, and that the clerk of the court below shall, on the proper request of the appellee, the plaintiff below, issue the proper execution on said judgment, the same as if no appeal bond had been filed.

We do not dismiss the appeal, because an appeal may be prosecuted without a bond filed, but such appeal will not stay execution. A bond is necessary, either on taking the appeal, or afterward on obtaining a supersedeas, to stay execution. All of which is ordered to be certified.

This was an action commenced in the Marion Superior Court, by the appellee, against the appellant, upon a

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contract. Answer in denial, payment, etc. Reply to the affirmative paragraphs of answer in denial. Trial of the issues by the court; finding and judgment for the appellee, the plaintiff below, in special term. Motion for a new trial, alleging for causes that the finding was contrary to law, was not supported by evidence, and that the damages were excessive. The motion was overruled, and exceptions reserved. The judgment at special term was affirmed, on appeal, in general term.

On appeal to this court, it is assigned for error that the court, in general term, erred in affirming the judgment at special term.

The question here presented is on the weight of the evidence. We can not reverse the judgment in this case on that.

The judgment is affirmed, with costs.

CHAPMAN v. MCCREA ET AL.

NEGLIGENCE.—*Liability of Bank for Failure to Protest Promissory Note.*—

Pleading.—A promissory note payable in a bank of this State was deposited, before maturity, with that bank, by a *bona fide* endorsee, for collection; but, on maturity of the note, which remained unpaid, the bank failed to protest the note and to notify the endorser of its non-payment, and within ninety days thereafter the maker was adjudged a bankrupt, whereupon the endorsee sued the bank for damages.

Held, on demurrer to the complaint, which alleged such facts and set out a copy of the note, that the complaint is sufficient.

From the Wabash Circuit Court.

M. H. Kidd, for appellant.

W. G. Sayre, for appellees.

BIDDLE, J.—The appellant complains of the appellees as follows :

That the defendants are partners, doing a general banking business at the city of Wabash, in the State of Indiana, under the firm name and style of the Citizens Bank, and especially engaged in making collections and remitting the proceeds for hire; that, on the 23d day of September, 1875, the plaintiff placed in the hands of the defendants, as such partners, engaged in conducting said Citizens Bank, for collection, and the defendants then and there undertook and faithfully promised to collect, for a reasonable compensation, a certain promissory note made by John R. Wallace and Cornelius E. Deihl, by the firm name and style of Wallace & Deihl, payable to Dwight Loomis, at the said Citizens Bank, then situated and doing business in the said city of Wabash, said note bearing date August 20th, 1875, and due at sixty days after date, calling for one hundred and seventy-five dollars and ninety-five cents, payable at the defendants' bank, and by said Loomis, who was at the time and still is solvent, for a valuable consideration, endorsed in writing on the back thereof, before maturity, to the plaintiff, a copy of which is filed herewith; that the said note was not paid at maturity or any part thereof; that, at the maturity of said note, the same was in the possession of the defendants and of their bank for collection, and that the defendants and their said bank wholly failed and neglected to protest said note for non-payment, and wholly failed and neglected to notify said endorser of the non-payment of said note, whereby the endorser became and is released from his liability to pay the same; that, on the 30th day of December, 1875, the firm of Wallace & Deihl and each of them became insolvent, and were adjudged bankrupts; that said note is still due and unpaid, except the sum of seventy dollars; that, by reason of, etc. Wherefore, etc.

A demurrer, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, was

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sustained, and judgment rendered against the appellant. He excepted and appealed.

We can not see any objections to this complaint. It is analogous to the case of *Tyson v. The State Bank of Indiana*, 6 Blackf. 225, in which the State Bank was held liable, through its branch at Lafayette, upon a similar state of facts. In the opinion of the court, delivered by SULLIVAN, J., the case is stated as follows:

“The State Bank, through one of its branches, having undertaken, for a reasonable reward, to collect the plaintiff's debt, placed itself in the situation of an agent or attorney, who, for reward, undertakes to perform services for another in the line of his business or profession. He is bound to a faithful discharge of his duty, and is responsible to his employer for all damages arising from his neglect.”

In the case of *The American Express Co. v. Haire*, 21 Ind. 4, this court quotes, with approval, the following sentence from Edwards on Bills of Exchange, p. 405 :

“Where a bank with whom a note is deposited for collection fails to take the proper steps to charge the drawer or indorsers, in consequence of which the holder is unable to collect the amount of the bill, the measure of damages is the face of the bill with interest.”

These principles are fully recognized and approved in the case of *The Montgomery County Bank. v. The Albany City Bank*, 7 N. Y. 459.

In the case before us, the note received for collection by the Citizens Bank was commercial paper, and the failure to protest it for non-payment discharged the endorser.

We think, therefore, that the facts averred in the complaint make the appellees liable to appellant for whatever damages he has sustained thereby.

The judgment is reversed, at the costs of the appellees, and cause remanded with instructions to overrule the demurrer to the complaint, and for further proceedings.

 Marsh v. Terrell.

MARSH v. TERRELL.

63	363
137	268
63	333
1171	50

NEW TRIAL.—*Assignment of Error.*—*Evidence.*—*Instruction.*—*Verdict.*—*Supreme Court.*—The allegations that a verdict is contrary to law and is not sustained by sufficient evidence, and alleged error in admitting or excluding evidence, or in giving an instruction to the jury, are causes for a new trial, and are not proper assignments of error in the Supreme Court.

SAME.—*Causes for New Trial.*—*Motion.*—A motion for a new trial must specify clearly and particularly the grounds of the motion.

From the Lawrence Circuit Court.

S. C. Willson, L. B. Willson and N. Crooke, for appellant.

G. Putnam and G. W. Friedley, for appellee.

Howk, C. J.—This was an action by the appellant, as plaintiff, against the appellee, as defendant, to recover the possession of certain real estate, particularly described, in Lawrence county, Indiana.

The appellant's complaint was in the usual statutory form in such cases; and to this complaint the appellee answered by a general denial.

The issues joined were tried by a jury, and a verdict was returned for the defendant, the appellee in this court.

The appellant's motion for a new trial was overruled by the court, and to this decision he excepted, and filed his bill of exceptions, and judgment was rendered on the verdict, in favor of the appellee and against the appellant, for the costs of suit, from which judgment this appeal is now prosecuted.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court:

"1. In ruling that the appellant had not sufficiently established the destruction of the records of the Cook County Court, of the State of Illinois, by fire, to let in secondary proof of the contents of said records;

"2. In permitting the appellee to read in evidence the

Marsh v. Terrell.

deposition of Cyrus M. Allen, which was not filed for several days after this cause was set for trial on the docket of said court at said term;

“3. In permitting the appellee to give parol testimony to contradict the covenants in Allen’s deed to Cochran and its other recitals and impeaching his own recorded warranty deed;

“4. In giving instructions to the jury, excepted to by the appellant at the time, especially the third, fourth and fifth instructions;

“5. The verdict of the jury was contrary to law;

“6. The verdict of the jury was not sustained by sufficient evidence; and,

“7. The court erred in overruling the appellant’s motion for a new trial.”

It will be readily seen, we think, that each and all of these alleged errors, with the exception of the seventh and last, are merely causes for a new trial. They should have been assigned as causes for a new trial, in the appellant’s motion therefor addressed to the circuit court. They were not properly assigned, in this court, as independent errors; and, as such errors, they present no questions for consideration or decision. This is well settled by numerous decisions of this court. *Freeze v. DePuy*, 57 Ind. 188; *Wiley v. Barclay*, 58 Ind. 577; *Bailey v. Boyd*, 59 Ind. 292; *Walls v. The Anderson, etc., R. R. Co.*, 60 Ind. 56.

The only questions for decision, therefore, in this case, are those which arise under, and are fairly presented by, the seventh and last alleged error—the overruling of the appellant’s motion for a new trial. In this motion, the following causes were assigned by the appellant for such new trial:

1. The verdict was contrary to law;

2. The verdict was not sustained by the evidence;

3. “The court erred in excluding on the trial legal, competent and material evidence offered by plaintiff;”

Egolf v. Bryant *et al.*

4. "The court erred in permitting defendant to give in evidence improper, illegal and incompetent testimony;" and,

5. "The court erred in giving erroneous instructions to the jury."

We need hardly say that the last three of these causes for a new trial were each too vague, indefinite and uncertain to demand any attention from the circuit court, or to present any question for decision by this court. This rule of practice, which requires that causes for a new trial shall be assigned with clearness, certainty, precision and particularity, was long since established, and is strictly adhered to, in this court. Buskirk Practice, p. 244, *et seq.*, and authorities cited; *Grant v. Westfall*, 57 Ind. 121.

The other two causes for a new trial, the first and second, present for decision the simple question, whether or not the verdict of the jury, in this case, was sustained by sufficient legal evidence.

We have carefully examined and considered the evidence in the record, and it seems to us, that this evidence fairly sustains the verdict of the jury.

In our opinion, no error was committed by the circuit court, in overruling the appellant's motion for a new trial.

The judgment is affirmed, at the appellant's costs.

EGOLF v. BRYANT ET AL.

PRACTICE.—*Dismissal of Complaint does not Carry Counter-Claim with it.*—

The dismissal of the complaint in an action, on the motion of the plaintiff, can not, over the objection of the defendant, carry with it a counter-claim filed by the latter.

63	365
156	284

Egolf v. Bryant et al.

SAME.—Exception.—Bill of Exceptions.—A bill of exceptions is not necessary to reserve an exception to the dismissal of a counter-claim.

SAME.—Complaint for Partition.—Counter-Claim to Foreclose Mortgage.—A cross complaint, so called, for the foreclosure of a mortgage on real estate, filed by a defendant in an action for the partition of such real estate, is properly a counter-claim.

From the Noble Circuit Court.

F. Prickett, for appellant.

PERKINS, J.—Suit by Warren C. Bryant and others for partition of a certain parcel of land.

Adam Egolf, who claimed an interest in a portion of the land, was made a defendant. He filed what he denominated a cross complaint, in which he alleged, that, to save the land for all the owners, by preventing its sale upon a foreclosure of a mortgage existing upon the whole of the land, he paid said mortgage, and now asked that his claim be adjusted and enforced, etc. Afterward the following entry appears of record:

“Warren C. Bryant et al. v. Adam Egolf. Complaint for partition.

“Now come the said plaintiffs, by Thomas M. Eells, their attorney, and comes also the said defendant, by Touseley & Prickett, his attorneys, and thereupon, on motion of plaintiffs, the petition of plaintiffs is dismissed at plaintiffs’ costs. And it is ordered and adjudged by the court that the cross complaint of the defendant follow the complaint, and that said cross complaint be, and hereby is, dismissed therewith, by virtue of plaintiffs’ said dismissal; to which order and decision of the court in so dismissing his cross complaint the defendant objects and excepts, and prays an appeal to the Supreme Court; which is granted, on the filing by said defendant of an appeal bond, in the penal sum of one hundred dollars, within sixty days, with John Rivir as surety, which bond is by the court approved. It is therefore considered by the court that the said defend-

The Board of Trustees of the LaGrange Collegiate Institute v. Anderson.

ant recover of said plaintiff's his costs and charges herein, taxed at — dollars and — cents."

No bill of exceptions was filed. We think, under section 559 of the code, a bill of exceptions was not necessary to reserve the exception in this case.

The pleading denominated a cross complaint was clearly a counter-claim. *Tabor v. Mackee*, 58 Ind. 290, and cases cited; *Harness v. Harness*, ante, p. 1.

The court erred in holding that the dismissal of the complaint carried with it, out of court, the counter-claim.

That part of the judgment is reversed, etc.

THE BOARD OF TRUSTEES OF THE LA GRANGE COLLEGIATE
INSTITUTE v. ANDERSON.

PROMISSORY NOTE.—*College Endowment Fund*.—*Answer*.—*Infancy*.—*Fraud*.

—*Evidence*.—In an action against the maker, on a promissory note executed to the trustees of a college, for the purpose of an endowment fund, and payable on condition that a specified sum should "be secured for" that purpose prior to a date named, wherein the complaint duly alleged that such sum had been fully secured within the time limited, the defendant answered alleging that a portion of such sum so secured consisted of promissory notes executed by infants, as the plaintiff well knew, with intent to defraud the defendant.

Held, on demurrer, that the answer is insufficient.

Held, also, that the facts alleged in such answer would not be admissible in evidence under the general denial.

Held, also, that the plaintiff, by producing promissory notes or other securities of apparently equal rank and value, to the amount specified, would thereby make out a *prima facie* case.

From the LaGrange Circuit Court.

A. A. Chapin, for appellant.

J. D. Ferrall, A. Ellison and J. S. Drake, for appellee.

The Board of Trustees of the LaGrange Collegiate Institute v. Anderson.

NIBLACK, J.—The board of Trustees of the Lagrange Collegiate Institute sued William Anderson on a promissory note, as follows :

“ \$50.00.

“ Three years after date, I promise to pay to the trustees of the LaGrange Collegiate Institute the sum of fifty dollars, with interest from date annually, for the purpose of a permanent endowment fund, provided ten thousand dollars shall be secured for the purpose previous to August 15th, 1867.

WM. ANDERSON.

“ GREENFIELD, IND., April 19th, 1866.”

The complaint averred that the sum of ten thousand dollars was secured as a permanent endowment fund before the 15th day of August, 1867, and that the note remained due and unpaid.

The defendant answered in six paragraphs.

The first, the general denial, and the rest setting up special matters in defence.

The plaintiff demurred to each paragraph of the answer except the first, but its demurrer was overruled.

The plaintiff then replied to the special paragraphs of the answer, and after some further proceedings, which need not be here noticed, the cause was submitted to a jury for trial.

A verdict was returned for the defendant, and judgment was rendered in favor of the defendant upon the verdict.

Counsel for the appellant brings specially to our attention the question of the sufficiency of the fifth paragraph of the answer.

That paragraph was as follows :

“ For a fifth defence to said action, the defendant says, that the whole amount secured to said fund prior to the 15th day of August, 1867, was ten thousand dollars ; that, of that ten thousand dollars, one thousand dollars was se-

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cured by promissory notes executed by persons each of whom was under twenty-one years of age at the time said notes were executed, which facts the plaintiff at the time knew, and the plaintiff accepted said notes of said minors with the fraudulent purpose of raising said fund up to ten thousand dollars, knowing that the said minors were not bound to pay any portion of said notes; that the following are the names of said minors, so far as defendant is informed, to wit, George C. Searing and George A. McKinlay."

We are of the opinion, that, under the complaint and the proviso contained in the note sued on, it was sufficient for the plaintiff to produce in evidence notes, or other securities of equal apparent rank and value, similar to the note in suit, which had been obtained previous to, and were under the control of the plaintiff as an endowment fund on, the 15th day of August, 1867, amounting in the aggregate, with the note in suit, to \$10,000.00, in order to make out a *prima facie* case under the averment that \$10,000.00 had been secured as required by said proviso.

We are also of the opinion, that any special defence, intended as an attack upon the validity of any such notes or other securities, ought to have alleged facts showing that such notes, or other securities, were invalid when the time limited for taking them expired, that is, on the 15th day of August, 1867. By the terms of the note sued upon, the plaintiff had until that time in which to arrange and complete its measures for the securing of the sum required by the proviso.

The note of a minor is voidable only, and not void. It might have been, as charged, that some of the notes, when executed, were voidable by reason of the infancy of the makers, and yet, by the 15th day of August, 1867, had become valid and available securities by some subsequent arrangement between the parties.

The Evansville, Cairo and Memphis Steam Packet Company v. Wildman.

In other words, conceding the allegations in the fifth paragraph of the answer to be true, yet the notes executed by the minors may have ceased to be voidable before the said 15th day of August, 1867. Tested by this rule, that paragraph of the answer was bad on demurrer.

But the appellee contends, that, if there was error in overruling the demurrer to that paragraph, it was nevertheless a harmless error, as the evidence admissible under it might have been given under the general denial.

We can not, however, sustain the position thus contended for by the appellee. Infancy, when set up as a direct defence to an action, must be specially pleaded. We think the same rule ought to be applied to the defence of infancy when interposed collaterally, as in the case at bar. This conclusion seems to us to be supported both by principle and by analogy.

The error committed by the court in overruling the demurrer to the fifth paragraph of the answer appears to us, therefore, to have been a material error, and one for which the judgment will have to be reversed.

Some other questions have been discussed by counsel, but, as they may not again arise in the cause, we have not considered them.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

63	370
180	381

3	370
171	31

THE EVANSVILLE, CAIRO AND MEMPHIS STEAM PACKET
COMPANY v. WILDMAN.

NEGLIGENCE.—*Wilful Injury.*—Action for Damages.—Complaint.—Act of Agent, Employee, or Servant —In an action by a passenger upon a steamboat, against a corporation owning and operating the same, to recover

The Evansville, Cairo and Memphis Steam Packet Company v. Wildman.

damages for injuries alleged to have been suffered by him while a passenger, through the negligence of the employees of the defendant, the complaint alleged, that the plaintiff had been "violently pushed, pulled and thrown through" a hatchway negligently left open by such employees, resulting in the injuries alleged.

Held, on demurrer, that the failure of the complaint to allege that such violence was the act of the defendant's employees renders it insufficient.

PRACTICE.—*Trial on Complaint Containing an Insufficient Paragraph.*—

Verdict.—*Supreme Court.*—*Record.*—Where a demurrer has been overruled to an insufficient paragraph of a complaint, an exception reserved, and, upon trial, a general verdict found for the plaintiff, the Supreme Court, on appeal, will reverse a judgment upon the verdict, unless it appear by the record that trial was had, and such verdict found, upon some other and sufficient paragraph of the complaint.

From the Posey Circuit Court.

B. Hynes, A. Gilchrist, A. P. Hovey and G. V. Menzies, for appellant.

W. P. Edson and M. W. Pearse, for appellee.

Howk, C. J.—In this action, the appellee, as plaintiff, sued the appellant, as defendant, in the Vanderburgh Circuit Court, in a complaint of three paragraphs.

In the first paragraph of his complaint, the appellee alleged, in substance, that, before and at the time of the commission of the grievances complained of, the appellant was the owner of a certain steamboat, known as the "Arkansas Belle," and ran and operated said steamboat upon the Ohio river, between the ports of Evansville, Indiana, and Cairo, Illinois, for the transportation of freight and passengers, for hire and reward, to be paid to the appellant; that, on the 17th day of March, 1873, the appellee was at the city and port of Henderson, Kentucky, and was desirous of procuring passage for himself and his horse upon said steamboat, from said city of Henderson to the town of Mt. Vernon, Indiana; that, at said time, said steamboat was towing a certain barge, and, upon arriving at said port of Henderson, landed with said barge between said steamboat and the wharf-boat, and it became and was necessary

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for the appellee to go over and across said barge, in order to reach and get upon said steamboat; that, upon the arrival of said steamboat at said port of Henderson, the appellee went upon said steamboat and informed an agent of the appellant, to wit, the clerk of said steamboat, of his wish to procure passage for himself and horse, as aforesaid, and was told by said clerk that they would be taken on board and carried to said town of Mt. Vernon; that thereupon the appellee, as a careful and prudent man, started to return to said wharf-boat, in order to have his horse brought on board of said steamboat; that, in attempting to cross said barge to said wharf-boat, through the carelessness and negligence of the appellant, its agents and servants, the hatches of said barge having been left open, and the gang-planks across said barge laid near to said open hatchway, the appellee, without any want of care or caution upon his part, was violently pushed, pulled and thrown through said open hatchway, into the hold of said barge, falling a distance of seven or more feet, by means whereof he, the appellee, was severely injured in and about his head, his ribs being broken, and being otherwise so severely injured as to render him insensible for, to wit, four hours; that, by reason of the appellant's negligence, the appellee was obliged to, and did pay out, to wit, three hundred dollars, in and about endeavoring to be cured of his said fractures, wounds and injuries, by reason of which he became and was sick, sore, etc., from said last named day up to the commencement of this action; and that, during all said time, by reason of his said bodily injuries, the appellee had suffered great bodily pain, and had been hindered and prevented from transacting his ordinary business; to his damage in the sum of five thousand dollars, for which he demanded judgment.

The second paragraph differs from the first, in that it avers that the appellant was injured in crossing the barge,

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without saying in what direction or for what purpose he was going, and in stating that the occurrence happened in the night time, and that there was not sufficient light upon the barge, and also that the pushing, pulling, etc., by which appellant got into the open hatch, was by the carelessness of defendant's servants.

The third paragraph alleges, in addition to what is stated in the first, that the occurrence was in the night time, that there was not light enough to see the open hatch, and that the violent pushing, pulling, etc., was by the negligence and carelessness of defendant's servants.

The appellant demurred separately to each of the paragraphs of the appellee's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. Before these demurrers were considered, on the appellee's application, the venue of the action was changed to the court below. In this latter court, the demurrers to the complaint were severally overruled, and to these decisions the appellant excepted, and then answered separately, by a general denial, each paragraph of the complaint.

The issues joined were tried by a jury, and a general verdict was returned for the appellee, assessing his damages in the sum of four hundred dollars. With their general verdict, the jury also returned their special finding as to particular questions of fact submitted to them; but we need not notice these special findings, as it is not claimed that these findings were inconsistent with the general verdict.

The appellant's motion for a new trial having been overruled, and its exception saved to this decision, judgment was rendered by the court below, on the general verdict of the jury, from which judgment this appeal is now prosecuted.

In this court, the appellant has assigned, as errors, the following decisions of the court below :

The Evansville, Cairo and Memphis Steam Packet Company v. Wildman.

1. In overruling its demurrer to the first, second and third paragraphs of appellee's complaint;
2. In overruling its motion for a new trial; and,
3. In rendering judgment for the appellee, on the general verdict.

In their brief of this cause, in this court, the appellant's counsel, in discussing the first of these alleged errors, complain only of the decision of the circuit court, in overruling the appellant's demurrer to the first paragraph of the complaint. The objection urged by counsel to this paragraph of the complaint is, that, while it was alleged therein that the hatches of the barge were left open through the carelessness and negligence of the appellant, yet it was not shown therein that the appellee's injuries, of which he complained, were caused by such carelessness and negligence, or by any other negligent acts of the appellant, its agents or servants.

It may be inferred fairly and reasonably, as it seems us, that the appellee's injuries resulted directly and proximately from the fact alleged, that he "was violently pushed, pulled and thrown through said open hatchway." By whom the appellee was thus violently pushed, pulled and thrown, he has failed to allege in the first paragraph of his complaint. It can not be assumed that these violent acts were done or committed by the appellant, or by any of its agents or employees; but, on the contrary, we think the fair presumption is, that the acts in question were done or committed by a stranger to the appellant. It is a clear proposition, that, if the alleged violent acts were done by some third person, neither an agent nor a servant of the appellant, it would not be liable in damages to the appellee for injuries resulting from those acts, even though it had been negligent in leaving such hatchway open. In our opinion, the circuit court erred in overruling the appellant's demurrer to the first paragraph of the appellee's

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complaint. Wharton Law of Negligence, sec. 134, *et seq.*, and authorities cited.

The appellant has assigned, as errors, the overruling of its demurrers to the second and third paragraphs of the complaint; but its attorneys have not even alluded, in argument, to the insufficiency of either of those paragraphs. The errors assigned on the demurrers to these paragraphs, even if they exist, must therefore be regarded as waived.

It is claimed, however, by the appellant's counsel, and correctly so we think, that the judgment in this case, by reason of the insufficiency of the first paragraph of the complaint, must be reversed, if the record fails to show affirmatively, that the verdict and findings were returned, and the judgment was rendered, exclusively upon the second and third paragraphs of said complaint, or one of them. We have carefully examined and considered the record of this case, and we can not say therefrom, that the verdict and judgment were returned and rendered wholly and exclusively on the second and third paragraphs of the complaint, or either of them. *Wolf v. Schofield*, 38 Ind. 175; *Peery v. The Greensburgh, etc., Turnpike Co.*, 43 Ind. 321; *Bailey v. Troxell*, 43 Ind. 432; *Schafer v. The State*, 49 Ind. 460.

In the case last cited, it was said by BUSKIRK, J., in delivering the opinion of the court: "It is the settled rule of practice of this court, that where a cause has been tried on issues joined upon a complaint containing two or more paragraphs, some defective and others good, a demurrer to the former having been overruled, the record not showing that the cause was tried and the judgment rendered exclusively upon the good paragraphs, the judgment will be reversed for error in overruling the demurrers to the defective paragraphs. To sustain a judgment in such a case, the record must affirmatively show that the finding and judgment proceeded wholly upon the good paragraphs."

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In the case at bar, the record makes no such affirmative showing as to the verdict and judgment below, and therefore the judgment of the circuit court must be reversed.

Having reached this conclusion in regard to the first error assigned by the appellant, it is unnecessary for us now to consider or decide any of the questions presented by or arising under the other alleged errors, complained of by the appellant. They may not arise again, on another trial of the cause.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the appellant's demurrer to the first paragraph of the appellee's complaint, and for further proceedings.

SHORT v. THE STATE.

63	376
130	409

63	376
145	307
147	43
147	58

63	376
150	85

63	376
154	178
154	180

63	376
164	236

CRIMINAL LAW.—*Change of Venue from County.—Judicial Discretion.*—The granting or refusing of a motion by the defendant in a criminal case for a change of venue from the county is a matter within the sound discretion of the court.

SAME.—*Burglary with Intent to Commit Larceny.—Indictment.—Value of Goods.*—An indictment for burglary with intent to commit a larceny need not aver the value of the goods which the defendant is alleged to have intended to steal.

SAME.—*Petit Larceny a Felony.*—Petit larceny is declared by the statute of this State to be a felony.

SAME.—*Indictment for Burglary and Larceny.—Election by State.—Judicial Discretion.—Verdict.—Acquittal.*—The defendant in an indictment containing one count charging burglary, and another charging larceny, moved the court to compel the State to elect upon which count trial should be had, whereupon the prosecuting attorney stated to the court, that both counts related to the same transaction, and that he meant to convict of one felony only, and thereupon the motion was overruled, trial had, and a verdict returned finding the defendant guilty of burglary.

Held, that, under the circumstances, it was within the discretion of the court to overrule the motion.

Short v. The State.

Held, also, that the verdict, being silent as to the charge of larceny, acquitted the defendant on that count.

SAME.—Inspection of Article Stolen.—Magnifying Lens.—Evidence.—One of the articles claimed to have been stolen by the defendant in such case was a gold ring bearing a certain inscription, and on the trial a gold ring found in the defendant's possession after the burglary, and claimed by the State to be the one stolen, was exhibited to the jury who were allowed to inspect it through a magnifying lens, to ascertain whether or not such inscription had been on and removed from the ring.

Held, that this was not error.

SAME.—Return of Verdict.—Failure to Poll Jury.—Where, on the return of a verdict against the defendant in the presence of himself and his counsel, he fails to ask that the jury be polled, he can not avail himself of an omission by the court to cause a poll of the jury to be made, without also showing, that, in fact, some of the jury were then absent.

SAME.—Omission of Name of State's Witness from Indictment.—Continuance.—The fact that the name of a witness before the grand jury is not placed upon the indictment is not ground for striking out evidence given by him as a witness on behalf of the State, on the trial of the cause; the only effect of such omission being to prevent the State from obtaining a continuance on account of his absence.

From the Tippecanoe Circuit Court.

J. L. Miller and M. W. Miller, for appellant.

T. W. Woollen, Attorney General, *J. L. Caldwell*, Prosecuting Attorney, and *A. W. Caldwell*, for the State.

PERKINS, J.—Indictment against William Short, containing two counts; one for burglary, the other for larceny.

Trial; conviction of the appellant of burglary, with a punishment affixed of imprisonment for a term of seven years in the penitentiary, and a fine of five hundred dollars, the verdict being silent as to the larceny.

A motion for a new trial was denied.

The following is a copy of the assignment of errors:

“1. The court erred in overruling the appellant's motion for a change of venue;

“2. The court erred in overruling the appellant's motion to quash the indictment;

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“ 3. The court erred in overruling the appellant’s motion to compel the prosecutor to elect upon which count of the indictment he would try the appellant ;

“ 4. The court erred in overruling the appellant’s motion for a new trial ;

“ 5. The court erred in overruling the appellant’s motion in arrest of judgment.”

We proceed to examine and decide upon the alleged errors :

1. The change of venue from the county was a ruling to be made or refused, in the sound discretion of the court. It does not appear that an unsound discretion was exercised. *Mershon v. The State*, 44 Ind. 598.

2. Attorneys for appellant say : “ The point relied on in the motion to quash the first count of the indictment is, that there is no value given to the goods ; in all other cases, we believe, where the act is done with intent to commit a felony, the particular felony intended must be set out and described with as much certainty as if the indictment had been to charge the party with a felony intended to be committed.” The attorneys insist, as we understand them, that petit larceny is not a felony, and that therefore, as the value of the goods is not stated, a felony is not shown.

But it is enacted, 2 R. S. 1876, p. 419, sec. 13, that “ Crimes which may be punished with death or imprisonment in the State’s prison, shall be denominated felonies, and all other offences against the criminal law, shall be denominated misdemeanors.”

The crime of petit larceny is a felony, by the above section. It is defined, and its punishment prescribed, in the felony, not in the misdemeanor, act. It was so in the code of 1843, p. 963, sec. 16, and in that of 1852.

The following is the act of March 3d, 1877 :

“ AN ACT to amend sections 19 and 20 of an act entitled

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‘An act defining felonies, and prescribing punishment therefor,’ approved June 10th, 1852.

“[Approved March 3d, 1877.]

“SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That section nineteen of the above entitled act be and the same is hereby amended so as to read as follows, to wit: Section 19. Every person who shall feloniously steal, take and carry, lead or drive away the personal goods of another, of the value of fifteen dollars or upwards, shall be deemed guilty of grand larceny, and upon conviction thereof, shall be fined not exceeding double the value of the goods stolen, be imprisoned in the state-prison not less than two nor more than fourteen years, and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period.

“SEC. 2. *And be it further enacted*, That section twenty of the above entitled act be, and the same is hereby amended so as to read as follows, to wit: Section 20. Every person who shall feloniously steal, take and carry, lead or drive away the personal goods of another, of the value of any sum less than fifteen dollars, shall be deemed guilty of petit larceny, and upon conviction therefor shall be fined not exceeding five hundred dollars, be imprisoned in the State’s prison not less than one nor more than three years, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period, or fined and disfranchised and rendered incapable of holding any office of trust or profit, and imprisoned in the jail of the proper county for any determinate period of time, not exceeding one year” Acts 1877, Reg. Sess., p. 63.

Petit larceny is a felony by our statute. Hence, it was not necessary, in this case, that the first count in the indictment should have alleged the value of the goods intended to be stolen. *Hunter v. The State*, 29 Ind. 80.

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3. It was in the discretion of the court, under the circumstances of this case, to compel, or otherwise, the prosecutor to elect on which count of the indictment he would prosecute the appellant. *McGregor v. The State*, 16 Ind. 9; *Griffith v. The State*, 36 Ind. 406; *Bell v. The State*, 42 Ind. 335; *Mershon v. The State*, 51 Ind. 14.

When the motion was made to compel an election, the "prosecutor stated to the court that both counts in the indictment related to the same transaction, differently stated, and that he meant to convict of one felony only." Further, the defendant was acquitted upon the count for larceny, and convicted only upon the count for burglary. The silence of the verdict as to the larceny was an acquittal of that charge.

4. We examine the grounds relied upon in the brief of counsel for a new trial. They were three :

"1. The court permitted the jury to examine with a magnifying, or jeweler's, eye-glass, a ring offered in evidence, to ascertain if there had been an inscription on said ring and then erased by filing."

The indictment in this case was for burglary. The dwelling-house of a Mr. Guthrie, described in the indictment, was broken into in the night-time, during the absence of the family. Only circumstantial evidence could be obtained to identify the individual who committed the act. Among other articles discovered to be missing, on the return of Mr. Guthrie and family to his house, was a ring, the wedding-ring of Mr. and Mrs. Guthrie, with an inscription thereon of the names of the parties, date of marriage, etc. Soon after the burglary was committed, appellant, Short, pawned articles of jewelry, including a ring, to a pawnbroker in Lafayette. If it could be shown that that ring was the wedding-ring of Mr. Guthrie and wife, it would be a circumstance tending to show that the appellant, Short, was the person who entered Guthrie's

house, where said ring was in keeping, the night that the burglary was committed. If the inscription mentioned could be found upon the ring, or a remaining part of it, it would strongly tend to identify the ring, as the Guthrie wedding-ring; and, if the eye-glass in question augmented the natural power of the eye to discover the inscription, it did that which, in the light of science, it was made for; and, if it did not, we are unable to perceive that its use could have done any harm.

2. Misdirection by the court of the jury. Appellant's attorneys say: "The charge is long, and contains much of good law; and, after reading the charge, it is hard to find much fault with it. But we think the charge, in connection with the evidence, is as strong against the defendant as it could well be made."

The charge occupies over nine closely written pages of the record. The attorneys treat it all as one instruction. It is not numbered at all. It is not divided into paragraphs. No exception was taken to any specified part of it. See Bicknell Crim. Prac. 198, *et seq.*

We have read the charge, and concur with the attorneys, that it "contains much good law," and that "it is hard to find much fault with it." And, upon the statement of counsel, in regard to its merits, we feel relieved of apprehension, that, by omitting to enter upon a tedious search through its pages for the purpose of discovering objectionable points, not definitely located in it by the attorneys, injustice may result to the appellant. We think the allusion to the change of venue was harmless.

"3. The third cause for a new trial was, that the verdict was contrary to law and evidence."

We can not reverse the judgment on this ground. The verdict is not contrary to law, and is supported by the evidence.

5. The fifth and last assignment of error is, that the court erred in overruling the motion in arrest.

The statutory grounds for such a motion are :

“*First* That the grand jury who found the indictment had no legal authority to inquire into the offence charged, by reason of it not being within the jurisdiction of the court.

“*Second.* That the facts stated do not constitute a public offence.”

The court may also, on its view of any of these defects, arrest the judgment without motion. Sections 144 and 145 of the code of criminal pleading and practice, 2 R. S. 1876, p. 409.

No ground existed for the arrest of the judgment.

We have examined all the questions presented by the assignment of errors, and, were this a civil cause, we should not feel under obligation to proceed further. But so defective is the criminal code of practice, that the court must go beyond it, to secure justice to the parties in criminal cases. See Bicknell Crim. Prac. 235.

We proceed to consider other objections made.

The court received the verdict of the jury, without the names of the jurors being first called. The bill of exceptions states, that the jury “returned into court, and the court propounded the question, ‘Have you agreed upon a verdict?’ and, receiving an affirmative reply, the verdict was then received and read by the court, without first calling over the jury, to ascertain if they were all present, and that the names of the jury were not called over either before or after the verdict was received, but were discharged by the court as soon as the verdict was read. The defendant, however, had an opportunity to poll the jury, if he had desired to do so; and the fact being that the court knew by observation, that the jury were all present and in their places when the verdict was received, and the de-

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fendant was personally present, and also by counsel, when the verdict was received."

It is enacted, by section 115 of the code of criminal pleading and practice, that, "When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all appear, their verdict must be rendered in open court. If all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again at the same or next term."

Section 160 of the same code is as follows: "On an appeal the court must give judgment, without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.

According to the bill of exceptions taken by the defendant (appellant), he did not claim, and does not now, that the jury by whom he was tried were not all in the box, and they alone, when the verdict was returned and received by the court. Such being the fact, no harm could have happened to the appellant by the failure to call the names of the jurors, and this point will be controlled by section 160, *supra*.

It is urged, that the testimony of a witness for the State, named Rosenzweig, should have been struck out, because he had been a witness before the grand jury, and his name was not upon the indictment. The only consequence of this omission was, that the State could not have obtained a continuance on account of his absence from the trial. Bicknell Crim. Prac. 54; 2 R. S. 1876, p. 375, sec. 18.

Other points are made, but are not pressed in argument, and we think the rulings upon them were correct

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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CRIMINAL LAW.—Incest.—Evidence.—Impeaching Witness.—The fact as to whether or not the prosecuting witness had become pregnant by means of sexual intercourse had by her with others than the defendant, and her declarations in relation thereto, are immaterial and irrelevant, on the trial of a defendant indicted for incest, either for the purpose of impeaching her testimony or for any other purpose.

SAME.—Reputation for Chastity and Virtue.—Evidence attacking her reputation for chastity and virtue is inadmissible.

From the Marion Criminal Circuit Court.

H. N. Spaan, for appellant.

T. W. Woollen, Attorney General, for the State.

BIDDLE, J.—Indictment against the appellant for incest committed with his daughter, Alice Kidwell. Plea, not guilty.

Trial by jury; verdict, guilty; punishment, eight years in the state-prison.

Motion for a new trial overruled; exceptions; judgment; appeal.

The following questions are presented by the record, and discussed by the appellant:

1. As the basis of impeachment, the appellant asked the prosecuting witness the following question:

“Did you not go with your father, about the 15th day of May, 1876, to the office of Dr. S. H. Moore, in this city, No. 155 North Tennessee street, for the purpose of having yourself examined by him? and did he not examine you and tell you that you were pregnant? and did you not tell him that a young man in the country was the father of your child?”

To this question the witness answered, “I did not.”

At the proper time the appellant called Dr. S. H. Moore as a witness, and, after fixing the time and place as above, propounded to him the following interrogatory as an impeaching question:

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“State whether or not, during the said conversation, she (the prosecuting witness) stated to you that a young man from the country was the father of her child?”

To this question the State objected, on the ground that the question was irrelevant and immaterial. The court sustained the objection, and the appellant excepted.

There is no error in this ruling. The question was both irrelevant and immaterial to the issue. The fact that the girl was pregnant, and that the father of her child was a young man from the country, neither tended to prove nor disprove the guilt or innocence of the defendant, as charged. The question of the paternity of the child is not involved. The law does not experiment in impeachments as to facts not relevant to the issue in the case. *Shields v. Cunningham*, 1 Blackf. 86; *McIntire v. Young*, 6 Blackf. 496; *Glenn v. The State, ex rel., etc.*, 46 Ind. 368.

The appellant offered to prove by a competent witness, that the prosecuting witness had, from the time she was fourteen years of age up to the time of the trial, borne a bad reputation for virtue and chastity. An objection was sustained to this evidence.

This ruling is correct. Her reputation for virtue and chastity was not material to the charge of incest, and the evidence was not proper to impeach her general character for truth and veracity. *Fogleman v. The State*, 32 Ind. 145; *Fletcher v. The State*, 49 Ind. 124; *Farley v. The State*, 57 Ind. 331; *Richie v. The State*, 58 Ind. 355; *Rawles v. The State, ex rel., etc.*, 56 Ind. 433.

The appellant moved the court to arrest the judgment. His motion was overruled; he excepted, and assigned the ruling as error, but has not discussed the question in his brief. We can discover no ground for the motion.

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There is no error of law in the record. The evidence sustains the verdict.

The judgment is affirmed, at the costs of the appellant.

DEARMOND ET AL. v. STONEMAN.

PRACTICE.—*Amendment of Answer to which Demurrer was Sustained.*—

Waiver.—Harmless Error.—A demurrer questioning the sufficiency of an answer consisting of a single paragraph having been sustained, the defendant, by leave of court, filed what he termed a second paragraph of answer, under which all the facts averred in his first answer were admissible in evidence.

Held, that, by so amending, error in sustaining such demurrer was waived, or rendered harmless.

SAME.—*Reply, Specially Denying Averments of Answer, Admissible under General Denial.*—Where, to an affirmative answer, a reply is filed, consisting of the general denial and a paragraph specially denying each material allegation of the answer, the facts averred in the special plea are admissible in evidence under the general denial; and therefore the defendant is not injured by the overruling of a demurrer questioning the sufficiency of the special plea.

From the Decatur Circuit Court.

B. W. Wilson, W. B. Wilson, C. Ewing and J. K. Ewing,
for appellants.

J. D. Miller and F. E. Gavin, for appellee.

PERKINS, J.—Suit to foreclose a mortgage, of which the following is substantially a copy:

“ This indenture witnesseth, that Julia E. Robbins and William F. Robbins, her husband, of Decatur county, in the State of Indiana, mortgage and warrant to Saddler, Pee, Root & Co., of the city of Indianapolis, Marion county, Indiana, the following real estate, situate in said county and State, viz. :

“ Lot number twelve (12) on the original plat of

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the town of Westport, county and State aforesaid, to secure the payment, when due, of one promissory note, bearing even date herewith, for the sum of three hundred and forty dollars, due six months from date, executed by the said William F. Robbins, payable to said Saddler, Pee, Root & Co., at the First National Bank of Greensburgh, Indiana, bearing interest at ten per cent. per annum after maturity, and attorney's fees, and waiving all relief from valuation or appraisement laws, and the mortgagors expressly agree to pay the sum of money above secured without relief from valuation or appraisement laws."

Signed and acknowledged by the mortgagors September 7th, 1876.

It is averred in the complaint, that William A. Bristor, one of the plaintiffs, is the owner, by assignment, of the interest of said Root; that said mortgage was duly recorded on the 16th day of October, 1876, being forty days after its execution.

Defendant Charles P. Root answered, disclaiming any interest. The defendants Robbins made default. DeArmond answered in one paragraph, to which a demurrer was sustained, and an exception entered. And therefore, says the record, "he is granted leave to file an additional paragraph to said answer, and, accordingly, files the following second paragraph, to wit:

"Par. 2. Defendant DeArmond says that he admits the execution of the note sued on by his co-defendants Robbins and wife, but he says that plaintiffs ought not to be allowed to foreclose said mortgage, as against this defendant, because of the fraudulent conduct of these plaintiffs. He avers the truth to be, that, before the execution of the note and mortgage sued on, and at the time, the defendant Julia E. Robbins was the owner, in her own right, of the property described in said mortgage, and her said husband was a debtor in failing circumstances; that the plaintiffs and

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said Robbins and wife, at the time of executing said mortgage, secretly agreed among themselves, that said mortgage should not be put upon record, nor should its existence be made known for a period of at least thirty days from its execution; that this agreement was fraudulently made to enable said William F. and Julia E. Robbins to sell said real estate to an innocent purchaser as unincumbered real estate; that, at the same time, it was agreed between said parties, that if said Robbins and Robbins could sell said property within thirty days, and could take a note from the purchaser for a like amount with the note in suit, dated within said thirty days, the plaintiffs would accept such note in lieu of the note and mortgage sued on, provided said note was executed by a solvent party, and would surrender the note and mortgage in suit, and not record the same. The defendant says he had no knowledge of said agreement, but believing said Julia E. Robbins had a perfect title, defendant did, in good faith, buy said property and pay therefor a large sum, viz., \$8,540, without knowledge of plaintiffs' mortgage; that, at the time of said purchase, viz., September 16th, 1876, and within thirty days, he executed for a part of the consideration of said purchase a promissory note, payable at the Citizens National Bank of Greensburgh, Indiana, to William F. Robbins for \$340, an amount equal to plaintiffs' claim; that said Robbins afterward, and before its maturity, assigned said note to the plaintiffs pursuant to said agreement originally made, which note was then and still is the note of a solvent party. This defendant further avers that the plaintiffs did receive said note according to the terms of their original agreement, and gave this defendant notice of their acceptance; that said plaintiffs afterward put said mortgage on record, and wrongfully refused to surrender the note and mortgage, and suffered said note of the defendant to be put in circulation, which note is now held by Henry

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C. Miller, by endorsement before maturity, and claims to be a *bona fide* holder, and is threatening to collect the same; that Julia E. Robbins, being a married woman, is not liable on her covenants, etc. Wherefore he prays that his title to the land be quieted," etc.

Reply in two paragraphs:

1. General denial;

" 2. The plaintiffs, for a second paragraph of reply, say, that they did not receive said note in payment, or in lieu of the note sued on, but only to make enquiry as to its solvency, etc.; that, after holding it long enough for that purpose, they returned it to the defendant William F. Robbins, who received and accepted the same, they, at the time, notifying him that they declined to receive the same; that thereupon the plaintiffs caused said mortgage to be recorded; that they deny all fraud, and all or any conspiracy with William F. Robbins, or any knowledge of any wrong intent on the part of said Robbins to reassign said note to any person whatever, and that said Miller is not a *bona fide* holder," etc.

A demurrer to this paragraph of reply was overruled, and an exception entered.

The issues were tried by a jury, who returned a verdict and answers to interrogatories, as follows:

" We, the jury, find for the plaintiffs, against all the defendants, and assess their damages at four hundred and nine dollars and ninety-six cents, including interest on note, and twenty dollars attorney's fee."

Interrogatories directed by the court to be answered:

" 1. Did the defendant William F. Robbins give the note for \$346, executed by John DeArmond to him on the 23d day of December, 1876, to Robert Headrick, the agent of the plaintiffs, with the express agreement that Headrick was to take the note to the plaintiffs, and that, if they received it, that he would return his, Robbins,' note and

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mortgage to him? if not, that he would return the DeArmond note? Answer: Yes.

"2. Did the plaintiffs ever return the note and mortgage sued on to the defendant Robbins? Answer: No."

Judgment and decree for William H. Stoneman, who had become the owner of the note and mortgage.

There was no motion for a new trial, nor any exception to the decree.

The errors assigned in this court are:

1. The court erred in sustaining the demurrer to the first paragraph of DeArmond's answer;

2. The court erred in overruling the demurrer to the second paragraph of reply.

If it be true, that the first error was committed, we could not reverse the judgment on account of it, for the two reasons, that the error was waived, and rendered harmless by the subsequent action of the party.

The second paragraph of answer was really but an amendment of the first, after demurrer sustained to it. Such amendment waived error, if error there was, in the ruling upon the first. *Polleys v. Swope*, 4 Ind. 217; *Patrick v. Jones*, 21 Ind. 249.

Again, all the evidence that could have been given, and relief had, under the first paragraph of answer, could have been given and had under the second. This being the case, the filing of the second paragraph rendered the ruling upon the first harmless. *The Terre Haute Gas Co. v. Teel*, 20 Ind. 131; *Stewart v. Anderson*, 59 Ind. 375.

Further, counsel for the appellant, in their brief, say:

"It is not deemed important to discuss the question whether or not the error assigned in sustaining the demurrer to the first paragraph of answer is available, the same question being presented by the ruling of the court on the demurrer to the second paragraph of reply."

This latter ruling presents the only question for the decision of this court.

Having carefully read the second paragraph of the answer, which is similar in its averments to the first, it appears to us that the entire merits of the cause were in issue and triable on the general denial of that paragraph of answer, contained in the first paragraph of the reply; that the second paragraph of the reply was, in effect, but a negation of certain facts in the answer. The second paragraph of answer consisted of affirmative allegations, and covered and presented the whole case. The general denial of the answer put in issue the whole merits of the cause. Every question presented by the second paragraph of reply was presented by the answer. The jury found upon the trial, that the averments of the answer were not true.

We can not see that the second paragraph of reply presented any new fact or question, or that the overruling of the demurrer to it could in any way have injured the defendant. That paragraph was but a special denial of the paragraph of answer already embraced by the general denial. Besides, there is nothing in the reply showing bad faith in the mortgagees. They had forty-five days in which to get their mortgage recorded. DeArmond knew that. He acted very carelessly. The mortgagees made no representations to him, nor did they know of his intention to purchase the property prior to his making it. Neither the reply nor the record, indeed, shows these facts. Instead of admitting, the paragraph denies all fraudulent concealment.

We see no error in the record.

The judgment is affirmed, with costs.

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DECEDENTS' ESTATES.—*Guardian and Ward.*—*Petition by Surety against Administrator of Deceased Guardian.*—*Order of Court to pay over Ward's*

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Estate.—Judgment.—Appeal to Supreme Court.—A surety upon the bond of a deceased guardian filed a petition against the administrator of such decedent's estate, representing that moneys belonging to the ward were in the hands of such administrator, who was paying the same out upon the general debts of such estate, and praying that the administrator be ordered to make a report of the amount of the ward's estate in his hands and pay the same over to the court for the use of such guardian's successor. Whereupon, under the order of the court, the administrator reported that his decedent's estate was chargeable with a certain sum belonging to such ward, that the estate was insolvent, and that the decedent had so commingled his ward's estate with his own, that the same could not be identified; and thereupon the court approved the report and ordered the administrator to pay into court, for the benefit of the ward, the amount so reported as belonging to him.

Held, that the surety, having paid no part of the amount due from his principal, had no right of action, and that such order was erroneous.

Held, also, that such order was a final judgment from which an appeal lies to the Supreme Court.

From the Boone Circuit Court.

J. A. Abbott and S. L. Hamilton, for appellant.

T. W. Lockhart and C. S. Wesner, for appellee.

NIBLACK, J.—The proceedings in this case were based upon a petition filed by William Neff against Robert D. Covey, administrator of the estate of Abner Gordon, deceased, which represented that the said Abner Gordon was, in his lifetime, the guardian of Nora C. Burch, minor heir of John M. Burch, deceased; that as such guardian the said Gordon executed his bond for the faithful discharge of his duties, with the petitioner, William Neff, as his surety, a copy of which bond was filed with the petition; that afterward the said Gordon received, and there came into his hands, as the assets of his said ward, the sum of four hundred dollars, which he had in his possession at the time of his death; that, after the death of said Gordon, one Logan Russell administered upon his estate; that the said sum of money so belonging to the said Nora C. Burch came into the hands of the said Russell, as such administrator, who never made any report concerning the condition of the

same, or of the estate of the said Nora in the hands of the decedent, Gordon, nor did the said Russell pay over said moneys to any one, for the use of the said Nora, except the sum of one hundred dollars, which he paid into the proper court; that Amanda Easterling has, since the death of the said Gordon, been appointed guardian of the said Nora.

That afterward the said Russell resigned as such administrator, and the said Robert D. Covey was, on the 26th day of April, 1876, appointed administrator of the estate unadministered of the said Abner Gordon, deceased, and took upon himself the duties of such administrator, receiving from the said Russell, his predecessor, three hundred dollars belonging to the estate of the said Nora; that the said Covey has failed and refused to pay said sum of money, either into court or to the present guardian of the said Nora, or to make any report of the condition of said money thus in his hands, but, on the contrary, is paying the same out on the debts due from and owing by the estate of the said Gordon, to the damage of the petitioner in the sum of three hundred dollars.

Wherefore the petitioner asked that the said Covey might be ordered to pay over all moneys in his hands belonging to the said Nora, or which she was entitled to receive from the estate of the said Abner Gordon, as her late guardian, to the clerk of the Boone Circuit Court, for the use of the said Nora, so that her present guardian may receive the same, and for all other proper relief.

Covey answered the petition, admitting that the said Abner Gordon was, in his lifetime, the guardian of the said Nora C. Burch, but alleging that all the money and property which came into his hands as such guardian were by the said Gordon merged into his own estate, and so converted to his own use; that, as such administrator, he had not received any money belonging to the said Nora, or held by the said Gordon as her guardian, only as he had

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taken possession of the estate of him, the said Gordon, into which the money and property of the said Nora had been already merged as above stated, and that the estate of the said Abner Gordon was insolvent.

Covey further answered, denying each and every material allegation contained in the petition.

The court thereupon ordered and directed that the said Covey should make and file in said court a final report, showing the amount of moneys in the hands of the said Abner Gordon, as guardian of the said Nora, at the time of his death.

Afterward, at the February term, 1877, of the court below, the said Covey reported under oath, that, on the 21st day of May, 1874, his decedent filed his account current, showing a balance in his hands, as guardian of the said Nora, of four hundred and eleven dollars and thirteen cents; that of that sum one hundred dollars was paid into court by his predecessor, Logan Russell, for the use of the said Nora; that nothing had ever come into his, the said Covey's, hands, to show what disposition had been made by the said Abner Gordon of any portion of the estate of the said Nora, other than as above stated; that no means belonging to the said Nora had ever come into his, the said Covey's, hands, nor had he paid out any thing on her behalf, nor could he find any thing amongst the notes, accounts, or other papers of his decedent, giving him any light upon the subject of said guardianship.

Upon the filing of Covey's report, the court ordered that the same be approved, and that the said Covey should pay into court for the benefit of the said Nora C. Burch the sum of three hundred and eleven dollars and thirteen cents out of the assets of the estate of the said Abner Gordon, deceased, to which decision and judgment of the court the said Covey at the time excepted.

No question is made here upon the sufficiency of the

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petition as a complaint, and the only error which is assigned in such a way as to present any question for our consideration is upon the character of the judgment which was rendered upon the pleadings and facts before the court.

Neither the facts stated in the petition nor in Covey's report showed any right of action in Neff, against the estate of Abner Gordon. A surety must first pay the debt for which he is liable, or some portion of it, before he can maintain an action, on account of such suretyship, against his principal, or, as in this case, against the estate of his principal. We see no objection to Neff's petition as a suggestion of reasons why Covey should have been required to report the condition of the estate of the said Nora C. Burch, which was in the hands of his decedent, so far as he was able to do so, but beyond that we are unable to construe it as having any force or effect.

By the approval of Covey's report, the court recognized it as containing a true statement of the situation into which the funds belonging to the said Nora had fallen after coming into the hands of the said Gordon; and by its subsequent action the court practically accepted the matters contained in such report as a finding of the facts enumerated in it.

That report showed that nothing had ever come into the hands of said Covey, which could be identified as either the money or the property of said Nora, and that the said Nora, by reason of the premises, had become simply a creditor of the estate of the said Gordon for the balance which came into his, the said Gordon's, hands, and remained unaccounted for.

The commingling of the estate of his ward with his own money, or other disposition of such estate by the guardian, by which the identity of the ward's money as a separate and distinct fund is destroyed, is a conversion of the estate

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of his ward, for which the guardian is liable to his ward, either in a separate action or upon his bond. *The State, ex rel., etc., v. Sanders*, 62 Ind. 562.

The facts reported by Covey indicated a liability of Gordon's estate to the said Nora for the balance still due her, which might be adjusted and paid in the same manner as the claims of other general creditors, but did not, we think, authorize the order and judgment of the court, which was pronounced upon those facts, requiring Covey to pay into court a definite sum of money, without regard to the rights of other creditors of the estate or to the general condition of the estate itself.

The appellee objects that the final order in this case does not constitute such a final judgment as may be appealed from to this court, but we can not sustain that objection. The order in question appears to us to have been such a final disposition of a proceeding in court as amounted to a final judgment, within the meaning of the statute allowing appeals to the Supreme Court. 2 R. S. 1876, p. 238, sec. 550.

So much of the final order and judgment in this case as required the appellant to pay into the clerk's office of the Boone Circuit Court the sum of three hundred and eleven dollars and thirteen cents, is reversed, with costs.

All of which is ordered to be certified.

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. HUFF, EXECUTOR, v. KRAUSE, ADMINISTRATOR.

STATUTE OF LIMITATIONS.—*Action on Account.—Decedents' Estates*—In an action against a decedent's estate, upon an open account, the administrator answered, alleging that none of the causes of action had accrued within six years prior to either the death of the decedent or the filing of the complaint.

Held, on demurrer, that the answer is sufficient.

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BILL OF EXCEPTIONS.—*Filed too Late.*—Where, on the 19th of May, thirty days are given to file a bill of exceptions, it is too late to file the same on the 19th of June following.

SAME.—*Evidence of Time of Filing in Vacation.*—*Clerk.*—*Judge.*—*Supreme Court.*—The official statement, not of the judge in the bill of exceptions, but of the clerk of the court in the record of the cause, is the only evidence to which the Supreme Court can look to ascertain the time, in vacation, when a bill of exceptions was filed.

From the Hamilton Circuit Court.

J. W. Evans and *R. R. Stephenson*, for appellant.

T. J. Kane and *T. P. Davis*, for appellee.

BIDDLE, J.—Complaint of the appellee, as administrator of the estate of Benjamin Olvey, deceased, upon a common count, with a bill of particulars, against the appellant, as the executor of the last will and testament of John Olvey, deceased.

A demurrer, alleging the insufficiency of the facts stated, was overruled to the complaint, and exceptions reserved.

Answer,

1. General denial;
2. Payment; and,
3. Statute of limitations.

Demurrer to third paragraph of answer for the alleged want of facts; overruled; exceptions.

Reply in denial to second and third paragraphs of answer, and a special reply also to the third paragraph.

Demurrer to the third paragraph of reply; overruled, and exceptions.

Trial by jury; verdict for the appellee.

Motion for a new trial; overruled; exceptions.

The only question raised by the motion for a new trial is the sufficiency of the evidence to support the verdict.

Judgment and appeal.

The errors assigned in this court are:

1. Overruling the demurrer to the complaint;

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2 Overruling the demurrer to the third paragraph of answer; and,

3. Overruling the motion for a new trial.

The insufficiency of the complaint is not insisted upon in the appellant's brief, and we can see no defect in it.

Nor can we see any defect in the third paragraph of answer. It avers that the several causes of action mentioned in the complaint did not accrue within six years next immediately preceding the commencement of this suit, nor within six years next immediately preceding the death of the defendant's decedent, John Olvey. The cause of action in the complaint is an open account of various items, and we think the third paragraph of answer is well pleaded, and that the demurrer to it was properly overruled.

The demurrer to the second paragraph of reply is not in the record, nor is the ruling upon it assigned as error; it therefore presents no question to us.

The verdict was returned into court, the motion for a new trial made and overruled, exceptions reserved, and judgment rendered, on the 19th day of May, 1877, and thirty days from that date were given to the appellant to perfect and file his bill of exceptions. On the 19th day of June, 1877, the bill of exceptions was filed in the clerk's office. This was too late. The bill of exceptions is no part of the record. *Thomas v. Hunter*, 44 Ind. 477; *Bargis v. Farrar*, 45 Ind. 41; *DeHaven v. DeHaven*, 46 Ind. 296; *The Logansport Gas-Light and Coke Co. v. Davidson*, 51 Ind. 472; *Schoonover v. Irwin*, 58 Ind. 287.

The statement in the heading of the bill is as follows:

"Be it remembered, that, on the 19th day of June, 1877, in vacation, after the April term of the Hamilton Circuit Court, and within the time specified by the court, the defendant, by Evans & Stephenson, his attorneys, filed in the office of the clerk of the Hamilton Circuit Court his bill of exceptions, which is signed by the court and filed by the clerk, and is in these words."

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This statement is necessarily made before the bill was completed, and, as the bill can not be filed until after it is completed, does not show that it was filed in time, notwithstanding the statement that it was "within the time specified." The judge, in vacation, can not say that the bill was filed in time, nor when it was filed. The clerk is the only officer that can file the bill, and his official statement of the filing must be our guide. See authorities cited above.

The evidence not being before us, we can not consider the question of its sufficiency.

The judgment is affirmed, at the costs of the appellant.

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CRIMINAL LAW.—Constitutional Law.—Defining Crime.—Title of Act.—

Neither the title, nor the body, of a statute defining a felony need designate the felony defined by giving to it a particular or technical name.

SAME.—Blackmail.—The act of March 10th, 1873, 2 R. S. 1876, p. 449, sufficiently defines the felony ordinarily designated as "blackmailing."

SAME.—Practice.—Grounds of Objection to Evidence.—The grounds of objection to the admission of evidence offered must be stated to the court, at the time the objection is made, which must appear by the record on appeal to the Supreme Court, to make error in admitting such evidence available.

SAME.—Evidence of Former Acquittal.—An offer to introduce the record of an acquittal of the defendant, on the trial of a former indictment against him, should be accompanied by an offer to identify the crime charged in that indictment with that charged in the indictment on which trial is being had.

From the Daviess Circuit Court.

J. W. Burton and J. W. Ogdon, for appellant.

T. W. Woollen, Attorney General, *J. H. O'Neill*, *D. J. Heffron*, *W. R. Gardiner*, *S. H. Taylor* and *M. F. Burk*, for the State.

63	399
125	506
63	399
145	459
63	399
157	327
63	399
171	666

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Howk, C. J.—The appellant and two other persons were jointly indicted, in this case, by the grand jury of the Daviess Circuit Court, at its March term, 1878.

The indictment contained but one count, in which it was charged, in substance, that the appellant, “one James F. Peachee, one John Doherty and one Harry Faulkner, late of said county, on the 15th day of October, A. D. 1877, at said county and State, did then and there unlawfully, feloniously, wilfully and knowingly, send to one Joseph Cabel a certain letter and written communication, signed with a fictitious name, to wit, ‘Vengeance,’ directed to the said Joseph Cabel, by the name and description of ‘Mr. Joseph Cabel, Washington, Indiana, Personal,’ threatening to do injury to the person and property and family of the said Joseph Cabel, which letter is in the words and figures following, to wit:”

Here follows a copy of the letter referred to, which is very long and full of threats, but we need not set it out in this opinion. The indictment then proceeds as follows:

“And on divers other days and at divers times, from said date up to the time of returning this indictment, did then and there unlawfully, feloniously, wilfully and knowingly, send and cause to be sent to the said Joseph Cabel other letters and written communications, signed with a fictitious name, to wit, ‘Vengeance,’ threatening to do injury to the person and property and family of the said Joseph Cabel, all with the intent then and there and thereby to extort and gain from the said Joseph Cabel a certain sum of money, to wit, five hundred dollars, contrary to the form of the statutes,” etc.

The appellant moved the court to quash the indictment, which motion was overruled, and to this ruling he excepted.

On the appellant’s written motion, the court struck out of the indictment the averments therein in relation to the sending of “other letters and written communications.”

On arraignment, the appellant's plea to said indictment was, that he was not guilty as therein charged.

On his application, the appellant was awarded a separate trial.

The cause was tried by a jury, and a verdict was returned finding the appellant guilty as charged in the indictment, and assessing his punishment at imprisonment in the state-prison for the period of two years.

The appellant's motions for a new trial and in arrest of judgment, in the order named, were severally overruled, and to each of these decisions the appellant excepted, and judgment was rendered on the verdict.

The appellant has assigned, in this court, the following decisions of the circuit court, as errors :

1. In overruling his motion to quash the indictment;
2. In overruling his motion for a new trial; and,
3. In overruling his motion in arrest of judgment.

We will consider and decide the questions presented by the appellant's counsel, arising under these alleged errors, in the order of their assignment :

1. The indictment in this case charged the appellant and his codefendants with the commission of one of the felonies mentioned in the 1st section of an act entitled "An act defining certain felonies and prescribing punishment therefor," approved March 10th, 1873. Acts 1873, p. 138; 2 R. S. 1876, p. 449. It is insisted in argument, on behalf of the appellant, that his motion to quash the indictment ought to have been sustained, because, as his counsel say, the above entitled act, under which the indictment was found, is unconstitutional and void. It is said, "that the act referred to is in violation of the 19th section of the 4th article of the constitution of the State, which requires every act to embrace but one subject and matters properly connected therewith, 'which subject shall be expressed in the title.'" The appellant's counsel claim, as

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we understand them, that no subject is expressed or embraced in the title of said act, because the particular felonies defined are not designated by their particular names, in said title.

We can not approve of that view of the subject. If the act were unconstitutional, for the reason suggested, then, for the same reason, the felony act of June 10th, 1852, would also be unconstitutional, and we would have no law in this State defining or prescribing punishment for treason, murder, manslaughter, rape, larceny, and many other felonies.

The felony act of June 10th, 1852, is entitled "An act defining felonies, and prescribing punishment therefor." It will be seen that this title is open to the same objection which the appellant's counsel urge against the constitutionality of the act of March 10th, 1873, for no particular felony is designated by name in the title of the felony act of June 10th, 1852. The subject of the act of March 10th, 1873, we think, is expressed in the title of the act with sufficient certainty to comply with the requirements of the constitution, and the act is not unconstitutional on that ground.

The appellant's counsel insist, that the act of March 10th, 1873, is void, for another reason. It is provided in section 2 of "An act declaring the law governing this State," approved May 31st, 1852, that "Crimes and misdemeanors shall be defined, and punishment therefor fixed, by statutes of this State, and not otherwise." 1 R. S. 1876, p. 606.

It is claimed by the appellant's counsel, as we understand them, that the act of March 10th, 1873, under which the appellant was indicted, is void, for the reason that it does not conform to the requirements of said section 2 of said act of May 31st, 1852, declaratory of the law governing this State. If it was true, that the act of

March 10th, 1873, was open to this objection, the act would certainly not be void for that reason ; for, where two statutes passed at different dates are in conflict, the later act stands as law, and the older act, if either, is thereafter void. But it seems to us that the act of March 10th, 1873, is not open to this objection of appellant's counsel ; for, in said act, the felony thereby created is accurately defined, **and its punishment fixed**, as provided for in the said section 2 of said act of May 31st, 1852. In truth, the objection of counsel to the act of March 10th, 1873, seems to be, not that the felony is not defined and its punishment fixed in the act, but that the General Assembly forgot or failed to give a name to the felony, by which it should be designated and known. The act is open to this objection, but **as the constitution did not, nor did any prior statute, require that the felony defined should be christened by a particular name**, the act is certainly not void for the want of any such name. In common parlance, the felony defined in the act is ordinarily denominated "blackmailing;" and, if a name is desired, that is sufficiently expressive, we think, to answer the purpose. The act of March 10th, 1873, is not void. The circuit court did not err in overruling the appellant's motion to quash the indictment.

2. The second alleged error, complained of by the appellant, is the decision of the court below in overruling his motion for a new trial. We will consider and decide the several questions, presented by the appellant's counsel in argument, which fairly arise under this second alleged error, in the same order in which counsel have discussed them, in their able and exhaustive brief of this cause in this court.

It is insisted by the appellant's attorneys, that the court erred in permitting the State to read in evidence to the jury a series of letters, numbered from one to seven, both inclusive. The prosecuting witness, Joseph Cabel, had testified on the trial, on behalf of the State, as follows :

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“During the fall of 1877, I received seven letters through the post-office at Washington, Indiana, addressed to me and all signed by the name, ‘Vengeance,’ except the fourth one, the fifth one, and the sixth one; [Here the witness identified the seven letters, handed to him by the prosecutor;] I received the first of the seven letters about October 15th, 1877.”

Without objection on the part of the appellant, the prosecutor read in evidence letter No. 1, on which the indictment was predicated, and which was set out therein.

When the State offered in evidence the other letters of the series, it appears from the bill of exceptions, that “the defendant at the time objected, and the court overruled the objections of the defendant and permitted said letters to be read to the jury, to which ruling of the court the defendant at the time objected and excepted.”

It does not appear from the bill of exceptions, that the grounds of his objection to the admissibility of these letters in evidence were stated by the appellant to the circuit court. It is well settled by the decisions of this court, that the record must show, that the grounds of the objection to the admission of evidence were stated to the court, at the time the evidence was offered and introduced; otherwise the decision of the court, in admitting the evidence, can not be complained of, as an available error, in this court. A general objection to evidence, such as was made by the appellant in this case, without informing the court of the grounds of the objection, is entitled to no consideration either from the court below, or from this court. *Harvey v. The State*, 40 Ind. 516; *Trogden v. Deckard*, 45 Ind. 572; *Smith v. Worland*, 50 Ind. 360; *Rosenbaum v. Schmidt*, 54 Ind. 231; and *McCormick v. Mitchell*, 57 Ind. 248. The question of the admissibility in evidence of the letters referred to, therefore, is not properly presented for our consideration or decision, by the record of this cause.

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What we have said in relation to the question just considered, will apply with equal force to the next point made by the appellant's attorneys in argument. It is claimed that the court erred in permitting the State to read in evidence to the jury, over the appellant's objection, certain letters written by the prosecuting witness, Joseph Cabel, in answer to the letters received by him, before referred to, signed by the name of "Vengeance;" which letters, written by Cabel, were by him addressed to "Vengeance." When Cabel's letters were offered in evidence, it appears from the bill of exceptions, that the appellant objected to the letters as evidence, that the court overruled the objection, and admitted the evidence, and that the appellant at the time objected and excepted to the decision of the court. But the record fails to show that the appellant, at the time, informed the court of the grounds of his objection. It is clear, therefore, from what we have already said, that the question of the admissibility in evidence of Cabel's letters, addressed to "Vengeance," is not properly presented for our consideration or decision, in and by the record of this cause. Buskirk Prac. 288, and authorities cited.

One other point is made by the appellant's counsel in argument, under the alleged error of the court in overruling the appellant's motion for a new trial. It is insisted by counsel, that the court clearly erred in excluding from the jury certain evidence offered by the appellant on the trial of the cause. It appears from the bill of exceptions, that the appellant's offer of the evidence excluded was in these words:

"The defendant, Peachee, next offered to read in evidence to the jury, in his behalf, an indictment returned against him, the said Peachee, at the March term, 1878, of said court, and the record of the trial and acquittal of him, the said Peachee, thereon; which the court excluded and refused to be read to the jury, to which ruling of the

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court the defendant Peachee, at the time, objected and excepted."

This was the entire offer. The appellant did not couple with this offer an offer to prove that he was the same James F. Peachee mentioned in said indictment and record of trial and acquittal, or that the crime charged in said indictment, and mentioned in said record, was the same felony charged in the indictment in this case, and for which he was then on trial. Nor did the appellant, in any manner, inform the court as to what particular fact he intended to prove by the offered evidence. It seems clear to us, therefore, that the court did not err in excluding the offered evidence; for the record of this cause fails to show, that the excluded evidence was material or pertinent to the issues joined in this case.

In our opinion, the court did not err in overruling the appellant's motion for a new trial.

3. In discussing the alleged error of the court below, in overruling the motion in arrest of judgment, the appellant's counsel "reiterate their argument adduced touching the motion to quash the indictment." We have already said all that we desire to say in answer to that argument.

We are clearly of the opinion, that the court did not err in overruling the appellant's motion in arrest of judgment.

We find no error in the record, of which the appellant can complain.

The judgment is affirmed, at the appellant's costs.

BUNDY v. RIDENOUR ET AL.

ACTION UPON COVENANT.—*Failure to Remove Encumbrance.*—*Conveyance.*—*Mortgage.*—*Damages.*—Unless he has paid part or all of the encumbrance, or has been evicted, the grantee of land conveyed by deed

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covenanting against encumbrances can recover of his grantor only nominal damages, in an action on the covenant, for failure to pay off or remove an encumbrance existing at the time of such conveyance.

SAME.—*Verbal Promise to Pay Encumbrance.*—The verbal promise of the covenantor to the grantee to pay off such encumbrance adds nothing to the covenant.

From the Marion Superior Court.

E. A. Parker, for appellant.

R. B. Duncan, C. W. Smith and J. S. Duncan, for appellees.

PERKINS, J.—Bundy sued Ridenour, Bowen and Parry.

In his complaint, he alleges that Jonathan M. Ridenour, on the 2d day of October, 1871, mortgaged a parcel of land to Mary A. Parry, to secure the payment of five thousand dollars, which mortgage was duly recorded; that afterward, viz., on the 10th day of July, 1872, said Ridenour conveyed a part of the parcel of land, by general warranty deed, to Cornelius Bowen, who afterward, to wit, on the 15th day of January, 1874, conveyed the same, by general warranty deed, to said Bundy; that said mortgage became due on the 1st day of June, 1876, and was not paid, or removed from said land, though plaintiff had demanded, and defendant Ridenour had promised, that it should be; that, for the reason that it was not so paid or removed, plaintiff was unable to sell said part of said parcel of land, but could have done so had the mortgage been removed, and that he was damaged, etc.; and he prays in his complaint that he may recover damages in the sum of twenty-five hundred dollars.

He does not ask that the other portion of said parcel of land may be first sold to satisfy said mortgage.

Answer in denial.

Trial by the court; finding for the plaintiff in the sum of one cent.

Motion by the plaintiff for a new trial overruled, and judgment on the finding.

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The plaintiff was chargeable with notice, at the time he purchased, of the incumbrance on the land. He had not paid off the incumbrance, nor any part of it, and there had been no eviction. The plaintiff still retains possession.

In *Knepper v. Kurtz*, 58 Pa. State, 480, SHARSWOOD, J., states the general rule of law applicable to the class of cases of which this at bar is one. He says:

“Nothing appears to be better settled in this State as well as elsewhere than that to maintain an action upon a covenant of general warranty, an actual eviction must be averred and proved.

And, if the action be for a breach of the covenant against incumbrances, only nominal damages can be recovered where there has been no eviction, and no payment of or upon the incumbrance, *Pomeroy v. Burnett*, 8 Blackf. 142; *Reasoner v. Edmundson*, 5 Ind. 393; *Black v. Coan*, 48 Ind. 385; unless there was fraud in the sale. *Greene v. Tallman*, 20 N. Y. 191; S. C., Sedgwick Lead. Cas. on Measure of Damages, 36.

We do not think the facts in the present case take it out of the general rule, and that rule has been too long established to be departed from without special reasons. We are not aware that any case has been decided in this State, in which the rule has been departed from. See *Burton v. Reeds*, 20 Ind. 87. The alleged promise to keep his covenant, on the part of Ridenour, was upon no new consideration, and added no legal obligation to that covenant, upon which this suit was brought.

The judgment below is affirmed, with costs.

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MORTGAGE.—*Mortgaging same Land, on same Day, to Different Persons.*—*Priority.*—Separate mortgages upon the same real estate, executed by the

63	408
128	53
63	408
133	665

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mortgagor, to several mortgagees, upon the same day, to secure the payment of debts having no priority, and recorded within time though upon different days, have no priority.

SAME.—*Foreclosure Without Notice.—Sheriff's Sale.—Rights of Mortgagee Having no Notice.—Redemption.—Purchaser May Pay off Mortgage.*—The foreclosure of one of such mortgages, without notice to the holder of the other, and the sale and conveyance of the mortgaged premises by a sheriff pursuant to such foreclosure, do not debar such holder from either foreclosing without redeeming or redeeming and foreclosing; but the holder under such sheriff's sale may pay off such mortgage and retain the premises.

SAME.—*Tender of Redemption Money.—Mesne Profits.*—Such holder, in an action to redeem and foreclose, need not tender the redemption money before bringing his suit; but he can not cause the holder under such sheriff's sale to account for *mesne* profits.

From the Boone Circuit Court.

H. C. Wills and J. C. Clements, for appellant.

BIDDLE, J.—The controlling facts alleged in the complaint of the appellant, against the appellees, are as follows:

That, on the 10th day of May, 1867, William N. Kraft was the owner, in fee-simple, of the undivided one-half of certain real estate, properly described; that, so being the owner of said real estate, Kraft on said day executed two separate mortgages on the same, one to George Lupton, to secure the payment of three several promissory notes, described, due to the mortgagee, and the other mortgage to the appellant, to secure the payment of a certain promissory note due to him, also described; that Lupton's mortgage was recorded on the 10th day of May, 1867, and the appellant's on the 11th day of May, 1867; that Lupton afterward assigned his notes and mortgage to Martin V. McKinney, who, on the 3d day of September, 1867, recovered judgment thereon in the court of common pleas of Boone county, for the amount of the debt, and a decree of foreclosure on the mortgage, under which decree the sheriff of the county sold the premises to the judgment plain-

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tiff, who assigned the certificate of purchase he received from the sheriff to John Peters, to whom the sheriff executed his deed accordingly; that Peters afterwards conveyed the premises to Martin V. McKinney and Estella McKinney, his wife, "who were, at the time, the owners of the other undivided half of said real estate;" that afterwards McKinney and wife conveyed the whole of said real estate to John W. Kernodle, who, with his wife, Clarissa A. Kernodle, executed a mortgage to the appellees, to secure the payment of a certain promissory note, described; that the appellees afterwards recovered judgment against Kernodle on the note, and a decree foreclosing the mortgage, under which the sheriff of the county sold the real estate to the judgment plaintiffs, who received the sheriff's deed therefor; that the appellant was not made a party to, and had no notice of, the suit by McKinney to foreclose the Lupton mortgage; that the appellant, at the May term of the Boone county Court of Common Pleas, 1868, recovered judgment *in rem* against the mortgaged premises, upon the mortgage made to him by Kraft, as aforesaid.

The complaint also alleges the value of the *mesne* rents and profits of the premises enjoyed by the appellees, and avers a tender of the balance due them.

Prayer that an account may be taken of the rents and profits, that the appellees be adjudged liable therefor, and that the amount be applied to the payment of their judgment, and, upon payment of the balance, that the appellant be allowed to redeem said premises, and have the same sold to pay his judgment, interest and costs, and for other proper relief, etc.

Upon the issue of a general denial, the case was submitted to the court, and a finding had for the appellees. By a motion for a new trial, overruled and exceptions taken, the appellant took his appeal, and has brought the evi-

dence before us, upon which the only question presented in the case arises.

At the trial the appellant introduced as evidence the mortgages, notes, judgments, decrees, executions, sheriff's returns and deeds, as charged in the complaint. As to these the question is not upon the weight of oral evidence, which is for the jury to decide, but one of the construction of written evidence, which is one for the court to decide; and we think the written evidence in this case clearly shows, that the appellant is entitled to have his mortgage debt paid out of the real estate in question. The mortgage to Lupton, under which the appellees remotely claim, and the mortgage to the appellant under which he immediately claims, were both executed on the same day, by the same mortgagor, upon the same real estate, which is now in controversy, and were both recorded within time. There is, therefore, no precedence shown between them; neither is senior or junior to the other; both stand equal upon the same ground. The appellant has the same right to have his mortgage debt paid out of the mortgaged estate as Lupton had to have his mortgage debt so paid; and all who claim under the decree of foreclosure of Lupton's mortgage, to which the appellant was not a party, and of which he had no notice, stand upon no better ground than Lupton did. But we do not think that the appellant stands in any condition to have the *mesne* rents and profits applied to appellees' debt; nor was it necessary, in a case of this kind, where both parties can be secured out of the real estate mortgaged, to make a tender before suit is brought. If the appellees will pay the appellant's mortgage debt, they, having first bought the property, will be entitled, as against the appellant, to hold it; if not, the appellant will have the right to redeem the property, as against the appellees, and subject it to payment of his mortgage debt, or to foreclose his mortgage, and sell the

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property without redeeming it from appellees, if he prefers to do so. *McCullum v. Turpie*, 32 Ind. 146; *McKernan v. Neff*, 43 Ind. 503; *Hasselman v. McKernan*, 50 Ind. 441; *Coombs v. Carr*, 55 Ind. 303; *Cauthorn v. The Indianapolis and Vincennes R. R. Co.*, 58 Ind. 14.

The judgment is reversed, at the costs of the appellees; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

HAYES ET AL. v. MATTHEWS.

PROMISSORY NOTE.—Principal and Agent.—Signature.—Church Trustees.—

A promissory note in the usual form, "we promise to pay," etc., executed in the individual names of the makers, with the addition of the words "trustees of the" etc., "church," is the obligation of the makers individually and not of the church.

SAME.—Alteration.—Erasure.—The erasure of such addition is immaterial, and is no defence to an action against the makers individually.

SAME.—How Agent may Bind Principal.—To avoid individual liability on the part of the agent on a promissory note executed by an authorized agent on behalf of his principal, the name of the latter must be both inserted in, and signed to, the note.

SAME.—Defence.—Parol Evidence.—No defence to an unambiguous promissory note, involving the introduction of parol evidence, varying the terms and legal effect of the note, is sufficient.

From the Kosciusko Circuit Court.

C. Clemans and *J. H. Taylor*, for appellants.

C. W. Chapman and *H. S. Biggs*, for appellee.

NIBLACK, J.—John W. Matthews sued William Hayes, Samuel Galbreath and Joseph H. Taylor, administrator of the estate of George W. Ryerson, deceased, on the following promissory note:

"\$200.

PIERCETON, IND., Jan'y 11th, 1871.

"Twelve months after date, we promise to pay to the

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order of J. W. Matthews the sum of two hundred dollars, payable at ———, value received, without any relief from valuation or appraisement laws, with interest at ten per cent.

DR. WM. HAYES,
"GEO. W. RYERSON,
"S. GALBREATH."

The defendants answered in two paragraphs :

1. That, at the time of the alleged execution of the note sued on, the persons whose names were attached to it as the makers thereof, were the trustees of the First Universalist Church, of Pierceton, Indiana, a corporation duly organized under the laws of the State; that said note was executed by the makers as trustees, as above stated, and not in their individual capacities, and was accepted by the plaintiff as the note of said corporation, and not otherwise; that, when the said makers signed their names to said note, there were attached to, and placed opposite, their names, the words "Trustees of the First Universalist Church, of Pierceton, Indiana;" that said words, so attached to and placed opposite the names of said makers, had been erased from off the face of said note, without the knowledge or consent of said makers, and for the purpose of making them personally liable to pay said note. Wherefore the defendants denied the execution of the note sued upon; and said paragraph was verified by the affidavit of the defendants.

2. That the First Universalist Church, of Pierceton, Indiana, was a corporation duly organized under the laws of the State, and authorized to transact business as such, and that the makers of the note in suit were, at the time said note was executed, the trustees of such corporation; that said note was executed for money loaned to such corporation, and as a church note; that said note was executed by the makers thereof as trustees, and in the manner and form directed by the church at a regular and public

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meeting, and was taken and accepted by the plaintiff as a church note; that the plaintiff loaned his money to the church corporation, and not to the makers of said note individually; that said makers did not use said money for their own benefit, but instead thereof used the same to build a church edifice.

The plaintiff demurred separately to each paragraph of the answer, and the court sustained his demurrer to both paragraphs.

The defendants declining to answer further, the court assessed the plaintiff's damages at the amount due upon the note, and rendered judgment for the amount of the damages so assessed against the defendants.

The appellants contend that both paragraphs of the answer were sufficient as defences to the appellee's action, and that consequently the court erred in sustaining the demurrer to those paragraphs.

If the note in judgment in this action had the words, "Trustees of the First Universalist Church, of Pierceton, Indiana," attached to it, and following the names of the makers, it would not even then, on its face, purport to be the promise of the corporation known as the First Universalist Church, of Pierceton, Indiana, to pay the sum of money specified in it. It would still only be the personal promise of the makers to pay the sum named, the additional words constituting merely a description of the persons of the makers, without in any manner affecting the legal character of the note itself. We are sustained in that view of this case by the case of *Mears v. Graham*, 8 Blackf. 144, and several subsequent cases.

It has been held, that, in order to bind the principal, and make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be de-

scribed as agent in the instrument. *Prather v. Ross*, 17 Ind. 495.

Tested by this rule, the alleged erasure upon the face, or alteration, of the note, set up in the first paragraph of the answer, was an immaterial erasure or alteration, and hence not well pleaded. See, also, *The Inhabitants of Congressional Township No. 11, etc., v. Weir*, 9 Ind. 224; *Hobbs v. Cowden*, 20 Ind. 310; *Means v. Swormstedt*, 32 Ind. 87; *Hays v. Crutcher*, 54 Ind. 260.

As the note under consideration purported on its face to be in legal contemplation the individual note of the makers, it follows that any defence which involved the introduction of parol evidence tending to give it a different construction, or to change its legal effect, was bad upon demurrer.

Cases have arisen upon defective or ambiguous instruments, in which parol evidence has been admitted to give effect to the intention of the parties to such instruments, but the precedents furnished by such cases are not applicable to the case before us.

We think the second paragraph of the answer was also insufficient.

We see no error in the record.

The judgment is affirmed, at the costs of the appellants.

JENKINS ET AL. v. JENKINS.

LANDLORD AND TENANT.—*Forfeiture of Lease for Non-Payment of Rent.*—

Demand.—By the terms of a written lease of a tract of real estate, the tenant was to pay to the landlord annually, on a specified day, a stipulated sum of money as rent; and if the annual rent was not promptly paid, as it became due, on or before the day specified, the lease was to be null and void.

Jenkins *et al.* v. Jenkins.

Held, there being no place of payment stipulated, that, to work a forfeiture of the lease for non-payment of rent, payment of the rent due should have been demanded by the landlord of the tenant, on the premises, just before sunset on the day specified.

Held, also, that a demand, made at any other time on such day, worked no forfeiture of the lease.

SAME.—*Notice to Quit for Non-payment of Rent.—Service.—Statute Construed.*—The ten days' written notice to quit for non-payment of rent, under section 4 of the act of May 20th, 1852, 2 R. S. 1876, p. 336, "regarding landlords, tenants," etc., must, under section 6 of such act, be served by delivering the notice itself to the tenant, or, if he can not be found, to some person of proper age and discretion, residing on the premises, after having first made known to him the contents of the notice.

SAME.—Service of such notice by reading the same to the tenant is insufficient.

From the Ripley Circuit Court.

E. P. Ferris and *W. W. Spencer*, for appellants.

W. D. Willson and *C. H. Willson*, for appellee.

Howk, J.—In this action, the appellee, as plaintiff, sued the appellants, as defendants, to recover the possession of certain real estate, and damages for the unlawful detention thereof.

The appellants demurred to the appellee's complaint for the want of sufficient facts therein to constitute a cause of action, which demurrer was overruled, and to this decision the appellants excepted.

The appellants then answered in six paragraphs, the first being a general denial, and each of the other paragraphs setting up an affirmative defence.

The appellee demurred to each of the third, fourth, fifth and sixth paragraphs of said answer, upon the ground that it did not state facts sufficient to constitute a defence to the action, which demurrer was overruled as to the third, fifth and sixth paragraphs, and sustained as to the fourth paragraph, of the answer, to which latter decision the appellants excepted.

The appellee then replied, by a general denial, to the second, third, fifth and sixth paragraphs of the answer.

The issues joined were tried by a jury, and a special verdict was returned in the words and figures following, to wit :

“We, the jury, find the facts in this case to be as follows :

“1st. We find, that, on the 10th day of December, 1868, the defendant Alexander Jenkins leased of the plaintiff the following real estate, in Ripley county, Indiana, to wit: The south half of the south-west quarter and the north-east fourth of the south-west quarter, and the north-west fourth of the south-west quarter, all in section 34, township 8 north, of range 10 east, containing 100 acres ; also the north-east of the south-east, and the south-east of the south-east, quarter, in section 33, township 8 north, of range 10 east, containing 80 acres ; also all that part of the north-east of the north-east quarter of section 4, township 7, north of range 10, that lies between the last named 40 acres and Otter creek, except a certain tract sold by Robert Ruby to James Fulton, being in all 253 acres ; and that said Alexander Jenkins is now in possession of the above described premises.

“2d. We find the conditions of the lease, as follows: Alexander Jenkins was to pay plaintiff (\$200.00) two hundred dollars each year for the use of said real estate, the first payment to be made March 1st, 1870 ; the lease was to extend during the natural life of the plaintiff, Jane Jenkins.

“3d. We further find, that it was stipulated in said lease, that, if the rent was not promptly paid, on or before the 1st day of March each year, as it became due, and on failure of Alexander Jenkins, or his heirs, to perform the condition of the lease, the same was to be null and void. And the said Alexander Jenkins was to pay the taxes now due, and to become due, on said premises. The further condition of the lease is, that the fee-simple interest of said

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real estate was at the time in Alexander Jenkins, and he was in possession, and if he should be disturbed in said possession, on account of any debt or default against himself, no deduction on account of rent shall be made on account of the same.

“ 4th. We find there was no condition in the lease of a forfeiture of the lease, in case the taxes were not paid.

“ 5th. We find that the rent has been paid to March 1st, 1874, and at the time this suit was brought or commenced, to wit, December 27th, 1876, there was another action pending in the Ripley Circuit Court, of Ripley county, Indiana, No. 1608, between Jane Jenkins, plaintiff in this action, and Alexander Jenkins, one of the defendants, commenced August 22d, 1876, and that the same was pending when this suit was instituted, and was for the identical same cause of action, so far as rent and taxes are concerned, as in this cause.

“ 6th. We further find, that, on the 1st day of March, 1876, the plaintiff made a demand of Alexander Jenkins, on the premises, for the sum of \$400.00 rent then due, or immediate possession of the premises; and that said demand was made at one o'clock P. M. of said day, and at no other time; and that said Alexander Jenkins refused to pay, stating that he did not owe any thing.

“ 6½. We further find, that, at the time of making the demand on the 1st day of March, 1876, there was due on the rent the sum of \$400.00.

“ 7th. We find that a notice was served by plaintiff on the 10th day of August, 1876, upon defendant Alexander Jenkins, on the premises, stating the premises as described in the lease, and notifying the said Alexander Jenkins to pay the rent, or give possession in ten days, and that no amount of rent was specified in said notice, and that the notice was read to the said Alexander Jenkins on the premises, about three o'clock P. M., and was not delivered

to the defendants, or either of them, but was returned to the plaintiff's agent; and that no other notice has been given.

"8th. We find, that Wiley Barrickman disclaims any interest in said premises, and as to Nancy Jenkins we find, that she has no interest in said premises.

"9th. We find, that the rent due on said premises, from March 1st, 1876, to this date, amounts to the sum of \$292.59.

"10th. We find, that the plaintiff never requested the said Alexander Jenkins to pay the taxes, at any time before the commencement of this suit.

"If, therefore, upon the aforesaid facts, the law is with the plaintiff, we find for the plaintiff, and assess his damages at \$292.59.

"If the law is with the defendant we find for the defendant."

The appellants each separately moved the court in writing, for judgment in their favor, on the special verdict of the jury, for the reason that the law was with them, which motion was overruled, and to this ruling they excepted.

The court sustained the appellee's motion for a judgment on the verdict, in her favor, and to this decision the appellants excepted.

Judgment was then rendered for the appellee, on the verdict, for the recovery of the possession of the real estate described therein, and of the damages assessed and costs, to the rendition of which judgment the appellants excepted, and appealed therefrom to this court.

Among the alleged errors of the court below, assigned by the appellants in this court, was the following:

"*Third.* Because the court erred in overruling the appellants' motion for a judgment on the special verdict of the jury."

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It appears from the averments of the appellee's complaint, that the appellant Alexander Jenkins was the tenant of the appellee, for and during her natural life, of certain described real estate, in Ripley county, Indiana, at an annual rental of two hundred dollars, payable on the 1st day of March in each year, during the continuance of the tenancy. It was stipulated in the written lease, a copy of which was made part of the complaint, that, if the rent was not paid promptly, when due, the possession of the demised premises was to be surrendered up to the appellee; and again, that the lease was to extend during the appellee's natural life, if the rent was promptly paid, on or before the 1st day of March, in each year, as it became due. The appellee's suit against the appellants was for unlawfully holding over the possession of the demised premises, after the written lease had been determined.

In the appellee's complaint, facts were alleged for the purpose of showing that the written lease had been determined in two modes: 1. By the forfeiture of the lease, by a formal demand of the rent due from the tenant, on the premises, upon the 1st day of March, 1876, the day the annual rent for the preceding year became due and payable, and the failure of the tenant to pay such rent when thus demanded; and, 2. By a written notice to the tenant, on the 10th day of August, 1876, to quit the possession of said premises or pay the rent then due upon the same, within ten days from that date, and the refusal of the tenant to either quit the possession or pay the rent within said term of ten days.

In either one of these modes, if the law applicable thereto had been strictly complied with, it is very clear, we think, that the lease in question would have been determined thereby, and the appellee would have acquired a right to the possession of the premises, as against her tenant, as if such lease had never been executed.

It is earnestly insisted, however, by the appellants' coun-

sel, that in this case the jury found, in and by their special verdict, that the lease 'from the appellee to the appellant Alexander Jenkins had never been determined, according to law, in either of the two modes alleged in the complaint; that, for this reason, the law of the case was with the appellants; and, that it followed of necessity, that the court below erred in overruling the appellants' motion for a judgment in their favor, on the special verdict.

The questions presented for our consideration and decision, by the special verdict and the appellants' motion for a judgment thereon, in relation to the alleged determination of the lease, may be thus stated:

1. Were the facts found by the jury, in reference to the day and hour, the place and the amount, of the demand made by the appellee, of the appellants, for the rent of the premises, sufficient to show a forfeiture of the lease?

2 Was there a legal and sufficient service found by the jury, in their special verdict, of the appellee's notice to the appellant Alexander Jenkins, "to pay the rent or give possession in ten days?"

We will consider and decide these two questions in their enumerated order:

1. In the sixth item of their special verdict, the jury found, that, on the 1st day of March, 1876, the appellee made a demand of the appellant Alexander Jenkins, on the premises, for the sum of four hundred dollars rent then due, or immediate possession of the premises, and that said demand was made at one o'clock P. M. of said day, and at no other time.

It is clear, we think, that the appellee's demand of the rent, as found by the jury, was not sufficient to work a forfeiture of the appellant's lease. The demand, though made at the proper place and on the right day, was not made at the proper time of the day. It should have been

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made just before sunset of the day on which it became due, on the premises, in order that the tenant's refusal to pay the rent should work a forfeiture of the lease. *Philips v. Doe*, 3 Ind. 132; *Meni v. Rathbone*, 21 Ind. 454; and *Bacon v. The Western Furniture Company*, 53 Ind. 229. In the case last cited, the landlord demanded of the tenant the rent due, on the day it became due, at three o'clock in the afternoon, at the tenant's business room, but not on the demised premises, and payment was then refused, and it was held that the lease was not forfeited.

In delivering the opinion of the court, it was said by BIDDLE, J.: "Forfeitures are not favored in law. They must be strictly construed. In this case, to entitle the appellant to re-enter and possess the premises, he should have demanded the specific amount of rent due, just before sunset of the day upon which it became due, and upon the premises leased, there being no place of payment mentioned in the lease." Taylor Landlord & Tenant, secs. 297 and 493.

In the case at bar, the jury did not find that the appellant had forfeited his lease from the appellee.

2. In the seventh item of their special verdict, the jury found that the notice to the appellant Alexander Jenkins, to pay the rent or give possession in ten days, was read to him, on the premises, and was not delivered to the appellants, or either of them. It is very certain, we think, that the service of the appellee's notice to the appellant Alexander Jenkins, as found by the jury, was not a legal, valid and sufficient service of such notice. In section 4 of "An act containing several provisions regarding landlords, tenants, lessors and lessees," approved May 20th, 1852, it is provided, that, "If a tenant neglect or refuse to pay rent when due, ten days' notice to quit shall determine the lease, when not therein otherwise provided, unless such rent be paid at the expiration of said ten days." 2 R. S. 1876, p. 340.

It was under this section of the statute that the notice, mentioned in the special verdict, was intended to be given. In section 1 of said act, one month's notice, in writing, is required to be delivered to a tenant at will, and, in section 3, three months' notice must be given to a tenant from year to year, in order to determine the respective tenancies.

Section 6 of the same act provides as follows:

"SEC. 6. Notice, as required in the preceding sections, may be served on the tenant, or, if he can not be found, by delivering the same to some person of proper age and discretion, residing on the premises, having first made known to such person the contents thereof." 2 R. S. 1876, p. 341.

By a fair and reasonable construction of these statutory provisions, we reach the conclusion, that the service of the appellee's notice to the appellant Alexander Jenkins, to pay the rent or give possession in ten days, as found by the jury in their special verdict, was an illegal, invalid and insufficient service of such notice, and that the only proper and legal mode of serving such a notice is by delivering the notice to the tenant, or, if he can not be found, by delivering the same to some person of proper age and discretion, as provided in said section 6 of the statute. We are strengthened in this conclusion by the provisions of section 5 of "An act concerning the unlawful detention of lands and the recovery thereof," approved May 13th, 1852, under which act this suit was brought. This section 5 provides, that "Where notice to quit is required by law, a copy of the same with proof of service, shall be necessary to recover by the plaintiff." From the provision in this section, it seems to us that the implication is very strong that the law assumes that the notice to quit is in the tenant's possession, and for this reason it makes "a copy of the same" evidence necessary to a recovery by the landlord.

The question we are now considering, so far as we are

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advised, has never before been presented to nor decided by this court. The appellee's action is against a tenant holding over. Of such actions, justices of the peace have had jurisdiction, in this State, for many years. In Wick & Barbour's Treatise, p. 200, and in Iglehart's Treatise, p. 473, of the law before justices of the peace, in this State, it is said that the notice to quit "should be served by delivering it to the tenant, or, if he can not be found, by delivering it to some person of proper age and discretion, residing on the premises."

In the case of *Seem v. McLees*, 24 Ill. 193, in construing a statute of Illinois, which provided that a tenant holding over, "after demand made in writing for possession thereof," should be adjudged guilty of forcible detainer, etc., it was held by the Supreme Court of that State, that "A demand made by reading a paper to the tenant, is not a demand made in writing. It is but an oral demand. The statute intended that the tenant should have a written demand, to which he could refer, and which he could examine, that he need not depend upon his memory to know what the demand was."

So, we think, with regard to the provisions of our statute for the service of notices to quit, by landlords upon their tenants.

In conclusion, we hold that the facts found by the jury, in their special verdict, show very clearly and conclusively, that the appellant Alexander Jenkins' lease from the appellee was neither forfeited nor determined according to law, and therefore that the court below erred in overruling the appellants' motion for a judgment in their favor on the special verdict. This conclusion renders it unnecessary for us to consider any of the other errors assigned in this case by the appellants.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the ap-

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pellants' motion for judgment, in their favor, on the special verdict of the jury.

Opinion filed at May term, 1878.

Petition for a rehearing overruled at November term, 1878.

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PRACTICE.—*Striking out Pleading.*—*Harmless Error.*—Error in striking out a paragraph of a pleading is harmless, where the facts therein alleged are admissible in evidence under a remaining paragraph.

EVIDENCE.—*Damages.*—*Opinion of Witness.*—*Watercourse.*—The damages to be recovered for an alleged wrongful obstruction of a watercourse forming the line between the lands of the parties can not be estimated by the mere opinion of a witness.

SAME.—*Time.*—*Evidence of Previous Tort.*—Where, in such case, the tort is alleged by the complaint to have been committed on a particular day, evidence of similar torts, previously committed, is inadmissible.

SAME.—*Costs not Exceeding Damages.*—*Form of Motion.*—*Practice.*—The verdict in such case assessed the plaintiff's damages at one dollar, whereupon the defendant moved the court "for a judgment for all the costs in the case, except the sum of one dollar, against the plaintiff."

Held, that the motion was properly overruled.

Held, also, that the proper motion in such case is, "that the plaintiff recover no more costs than damages," etc.

From the Franklin Circuit Court.

H. Berry and — *Berry*, for appellant.

S. E. Urmston, for appellee.

BIDDLE, J.—Complaint by the appellee against the appellant, alleging the obstruction of a watercourse which forms the line between the lands of the parties.

Answer, general denial and two special paragraphs.

On motion of appellee, the court struck out the second paragraph. Exceptions. Trial by jury; verdict for appellee, one dollar.

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Over a motion for a new trial, and exceptions, the court rendered judgment on the verdict, and, over a motion to tax all the costs over one dollar to the appellee, rendered a judgment for full costs in his favor. Exceptions.

The following questions are presented by the record and discussed by the appellant.

1. Did the court err in striking out the second paragraph of answer?

We need not examine this question very carefully. The third paragraph of answer, upon which the appellee took issue, was the same, in effect, as the second. The appellant had all the benefit of the matter alleged in the second paragraph by the issue formed upon the third. He can not therefore complain.

2. At the trial the appellee asked James Johnson, a competent witness, the following question:

“State what amount of damage, if any, in your opinion, the plaintiff has sustained on account of this washing, occasioned by this obstruction.”

Over an objection and exception, the court allowed the witness to answer the question, as follows:

“I should state the damage at twenty-five dollars.”

This is erroneous. The damages should not have been estimated by the opinion of the witness, but by the jury from the facts proved. *The Evansville, Indianapolis and Cleveland Straight Line R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Sinclair v. Roush*, 14 Ind. 450; *Mitchell v. Allison*, 29 Ind. 43; *The City of Logansport v. McMillen*, 49 Ind. 493.

3. The injury complained of, and the time it was committed, are averred in the complaint in the following words: “That said defendant, with force and arms, on the 1st day of May, 1876, entered upon said lands, and erected fences and walls, and threw and put into said creek brush, stones, lumber and other materials, upon the lands of said plaintiff,” etc.

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Under this averment, and over the objections of the appellant, the court allowed evidence to go to the jury tending to prove similar injuries done at different times before the 1st day of May, 1876. Was this ruling correct?

As a general rule, when the injury complained of consists of a single act, committed at one time, the time at which it is alleged in the complaint to have been done is not material, when it is within the statute of limitations; but when the injury complained of consists of a series of acts, done from time to time, continued and maintained through a given period, the time may become material, and the party, in such case, will be confined in his proof within the limits of his allegations; as when trespass to lands is laid with a *continuando*. Time may also become material in identifying an act, and as the means of limiting the damages caused by the act alleged.

According to the case of *Kortz v. The City of Lafayette*, 23 Ind. 382, we think the court erred in admitting evidence tending to prove injuries done before the 1st day of May, 1876.

4. The court also refused to give an instruction to the jury limiting the damages to acts done upon and after the 1st day of May, 1876, up to the commencement of this suit. Upon the same principle, this ruling was also erroneous.

5. At the proper time, the appellant moved the court "for a judgment for all the costs in the case, except the sum of one dollar, against the plaintiff."

This motion was properly overruled. The motion should have been, that the plaintiff recover no more costs than damages, namely, one dollar. This is what the statute says. 2 R. S. 1876, p. 195, sec. 398.

Such a motion, as the title to real estate did not come in question by the evidence, should have been sustained.

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Willman v. Clouser, 16 Ind. 318; *Holmes v. Wright*, 36 Ind. 383; *Floyd v. Miller*, 61 Ind. 224.

The judgment is reversed, at the costs of the appellee, and the cause remanded, with directions to sustain the motion for a new trial, and for further proceedings.

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SHERIFF.—*Action on Sheriff's Bond, for Failure to Advertise and Sell.—Defence.—Attorney.*—In an action by an execution plaintiff, against a sheriff and his sureties, upon the sheriff's bond, for a failure of the sheriff to advertise and sell the property of the execution debtor, an answer, that the sheriff's failure to advertise and sell was pursuant to the direction of the plaintiff's attorney, is sufficient.

SAME.—*Exemption from Execution.—Pleading.—Exhibit.*—The defendants in such action answered, that, when about to make a levy, the debtor, who was a resident householder of the State, had demanded three hundred dollars worth of property as exempt from execution, and presented his verified schedule of his property, and that an appraisement thereof showed it to be of a less value than three hundred dollars.

Held, on demurrer, that the answer is sufficient.

Held, also, that copies of such schedule and appraisement could not be made part of such answer by attaching them thereto.

From the Fountain Circuit Court.

L. Nebeker and *S. M. Cambern*, for appellants.

NIBLACK, J.—This was an action by the State, on the relation of George K. Share and George J. Latchworth, against George W. Boyd, James R. Ratcliff, Prier Cates, William Younts and Samuel F. Wood, on a sheriff's bond executed by the said Boyd as principal, and by the other defendants as his sureties.

The complaint was in two paragraphs.

The first alleged a recovery of a judgment in the common pleas court of Fountain county, by the relators,

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against one William Kreausch, the issuing of an execution on said judgment, and the delivery of such execution to the said Boyd, as sheriff of said county of Fountain, the levy by the said Boyd upon property of the said Kreausch, and the neglect and failure of the said Boyd to advertise and sell such property, or to otherwise make the money due on said execution.

The second paragraph alleged the recovery of a judgment, the issuing of an execution and placing it in the hands of the said Boyd, as sheriff, as set out in the first paragraph; that, at the time said execution came into the hands of the said Boyd, the said Kreausch was the owner of real and personal property of the value of six hundred dollars, but that the said Boyd failed to make a levy of said execution upon the property of the said Kreausch, and returned such execution unsatisfied.

The defendants answered in four paragraphs, but, as the fourth paragraph was held bad upon demurrer, we need not further notice it here.

The first paragraph was in general denial.

The second paragraph admitted the recovery of a judgment by the relators against Kreausch, the issuing of an execution upon said judgment, the placing of said execution in the hands of said Boyd, and the levy by the said Boyd on the property of Kreausch, and averred that said Boyd was proceeding to advertise and offer said property for sale, but was prevented from so advertising and offering said property by the relators' attorney, who ordered and directed the said Boyd not to advertise and offer said property for sale until further otherwise ordered. Wherefore it was by reason of the order of the relators' attorney, that said property was not advertised and sold.

The third paragraph also admitted the recovery of a judgment by the relators against Kreausch, the issuing of

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an execution on said judgment, and that such execution came into the hands of the said Boyd, as sheriff of the said county of Fountain, and was levied upon the property of the said Kreausch, but averred, that, at the time said execution came into the said Boyd's hands, the said Kreausch was a resident householder and the head of a family, and demanded that he, the said Boyd, should have set off to him, the said Kreausch, an amount of property equal to three hundred dollars, presenting, at the same time, an inventory of his goods, rights, credits, etc., and a schedule and appraisement of his property as made and sworn to by two appraisers, duly selected and sworn for that purpose, by which it was shown that the said Kreausch was not worth three hundred dollars in property, said schedule and appraisement not amounting to that sum. Wherefore the said Boyd did not proceed to advertise and sell said property. A copy of which said schedule and appraisement was filed with said third paragraph, and marked as "Exhibit A."

The relators demurred separately to the second and third paragraphs of the answer, but their demurrer was overruled as to both of those paragraphs; and, refusing to reply further to said paragraphs, or to proceed further in the cause, final judgment was rendered in favor of the defendant.

Errors are assigned here in such a way as to raise only the questions of the sufficiency of the second and third paragraphs of the answer respectively.

The facts set up in the second paragraph of the answer might perhaps have been more compactly and more specifically stated, but we see no substantial objection to the sufficiency of that paragraph. The attorney of the plaintiff has the right to control the service of an execution by virtue of his original retainer, and both the plaintiff and his attorney may authorize the sheriff to depart from the

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regular and ordinary course of executing it. Crocker Sheriffs, sec. 412.

In their discussion of the third paragraph of the answer, counsel for the appellant devote most of their time to objections to the schedule accompanying that paragraph, and treat it as if it were a part of the paragraph to which the demurrer below extended.

This court has, however, frequently decided, that the filing of a written instrument not the foundation of the action or defence, as an exhibit accompanying a pleading, does not thereby make such instrument a part of the pleading with which it is filed. *Wilkinson v. The City of Peru*, 61 Ind. 1, and authorities there cited.

The schedule above referred to was not the foundation of the defence set up by the paragraph with which it was filed, but would only have been evidence tending to sustain that paragraph, if adjudged admissible by the court, over the objections urged by counsel.

The question of the sufficiency of the schedule, under the statute, was not, therefore, raised in the court below by the demurrer to the third paragraph of the answer, and is consequently not presented for our consideration in this court.

Although somewhat diffusely and inferentially stated, we construe this third paragraph, when considered independently of the schedule, to mean that the execution defendant, being a resident householder and the head of a family, demanded that three hundred dollars worth of his property should be set off to him as exempt from execution, presenting at the same time a schedule of his property, and that an appraisement of such property showed that it did not amount in value to three hundred dollars; whereupon it was all set apart to the said execution defendant as exempt from execution.

As thus construed, we think the paragraph in question

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contained a good defence to the charge that the sheriff, Boyd, had wrongfully failed to advertise and sell the property of the execution defendant, levied on by such sheriff. *Douch v. Rahner*, 61 Ind. 64.

It is also objected that the second and third paragraphs of the answer were bad, because they purported to answer the whole complaint, while, in reality, they were only answers to the first paragraph of the complaint; but we are of the opinion, that, though informally pleaded, the facts alleged in both of said paragraphs of the answer constituted a substantial defence to both paragraphs of the complaint, as the gist of both of those latter paragraphs was the failure to make the money due upon the execution, out of the property of Kreausch.

We see no sufficient reason for reversing the judgment below.

The judgment is affirmed, at the costs of the relators of the appellant.

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PRACTICE.—*Judgment Non Obstante.*—*Verdict.*—*Special Findings.*—Judgment on the special findings of a jury, notwithstanding their general verdict, can be rendered only when the former are inconsistent with the latter.

PROMISSORY NOTE.—*Interest.*—*Mistake.*—*Pleading.*—*Evidence.*—In an action on a promissory note stipulating for the payment of a specified sum, "with ten per cent.," the plaintiff is entitled to have interest computed at the rate of ten per cent., without either averment or proof of mistake.

SAME.—*Harmless Error.*—Evidence which, though possibly erroneous, is harmless, is not sufficient ground for a new trial.

From the Vigo Circuit Court.

W. E. Hendrich and *J. G. Williams*, for appellant.

T. W. Harper, *J. M. Allen*, *W. Mack* and — *Davis*, for appellee.

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Howk, C. J.—In this action, the appellee sued the appellant, in a complaint of three paragraphs, upon a promissory note, of which the following is a copy :

“\$500.00. TERRE HAUTE, Ind., December 13th, 1870.

“One year after date, I promise to pay to the order of Charles Yung *fife hundret* dollars, value received, without any relief from valuation or appraisement laws, with 10 per cent.

(Signed,)

“JACOB FISCHER,
“E. OHM.”

In the first paragraph of his complaint, the appellee alleged, in substance, that, on the 13th day of December, 1870, the appellant and one Jacob Fischer, by their note, a copy of which was filed with and made part of said paragraph, promised to pay the appellee five hundred dollars, in one year after date, for and in consideration of \$500.00 at that time loaned to said Fischer for one year by the appellee; that when said note was written, “by a mistake of the scrivener,” the word “interest” was omitted after the words, “with 10 per cent.,” that it was understood and agreed by and between all the parties to said note, before and at the time of its execution, that it was to draw interest at the rate of 10 per centum per annum from its date; that the scrivener, in writing the words “five hundred dollars” in the body of said note, by mistake wrote the same “fife hundret dollars;” and that by the words, “fife hundret,” were meant and intended “five hundred.” And the appellee asked, that the court would reform the contract so as to correspond with the facts above stated, and for judgment for eight hundred dollars, and for other relief.

The second paragraph of the complaint differs from the first paragraph only in this, that it charges the alleged mistakes in the note sued on to be the “mistake or fraud” of Jacob Fischer, one of the makers of said note, who

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wrote the said note, and that it was due and unpaid; and in this, that it admitted that the interest had been paid on said note until December 13th, 1873, and judgment was asked for as in the first paragraph.

The third paragraph was the same as the second paragraph of the complaint, except that it contained no allegation of any mistake or fraud in the note sued on, and judgment was demanded therein for eight hundred dollars, and for other relief.

The appellant's demurrer to the third paragraph of the complaint, for the want of sufficient facts therein, was sustained by the court.

The appellant then answered in two paragraphs; the first was a general denial, and the second paragraph was in the nature of a special denial.

The cause was tried by a jury, and a general verdict was returned for the appellee, assessing his damages at six hundred and three dollars and ninety cents. With their general verdict, the jury also returned their special findings on particular questions of fact submitted to them in writing, under the direction of the court, as follows:

"1. Did Ohm and Yung ever talk about the rate of interest the note was to bear before the note was executed?

"Ans. He did not before, but he did in a few days after.

"2. Did Ohm and Yung ever agree before the note was executed, that the note should bear 10 per cent. interest from date?

"Ans. They did not.

"3. Did not Fischer bring the note to Yung, signed as it now is, before Yung had any talk with Ohm about it?"

"Ans. He did.

"4. Is not Ohm simply surety on the note?"

"Ans. As between Fischer and Ohm, he is surety.

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“ 5. Did not Ohm know, when the note was given, that it was to bear 10 per cent. interest ?

“ Ans. He did.”

The appellant moved the court for judgment on the special findings of facts, notwithstanding the general verdict ; which motion was overruled, and to this decision he excepted. His motion for a new trial was also overruled, and to this ruling he excepted, and judgment was rendered on the general verdict.

The following decisions of the circuit court have been assigned by the appellant, as errors, in this court :

1. In overruling his motion for a judgment, in his favor, on the special findings of the jury ; and,

2. In overruling his motion for a new trial.

1. The appellant's motion for a judgment, in his favor, on the special findings of the jury, notwithstanding their general verdict, was correctly overruled. There was no substantial or material inconsistency between the special findings of facts and the general verdict of the jury. It is only “ When the special finding of the facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.” 2 R. S. 1876, p. 172, sec. 337. *Murray v. Phillips*, 59 Ind. 56, and *Hollingsworth v. Trueblood*, 59 Ind. 542.

2. In the appellant's motion for a new trial of this action, the following causes for such new trial were assigned :

1. The verdict of the jury was contrary to law ;

2. The verdict of the jury was not sustained by the evidence ;

3. In giving the one instruction asked for by the appellee ; and,

4. Error of law occurring at the trial, in this, to wit :

1st. In admitting, over the appellant's objection, the

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part of the appellee's testimony wherein he detailed a conversation with one Jacob Fischer, when Ohm was not present, as to what rate of interest the note in suit was to bear; and,

2d. In allowing the note in suit to be examined by the jury, after the evidence was closed, the arguments of counsel ended, and the instructions of the court finished, and the jury charged by the court.

5. The damages assessed by the jury were excessive.

We will consider and decide such questions only arising under the second alleged error, as the appellant's counsel have presented and discussed in their brief of this cause in this court. Over the appellant's objections and exceptions, the court permitted the appellee, Yung, to testify as a witness in his own behalf, as follows:

"Fischer came to me, and asked me to let him have \$500 more money, at the same rate of interest he was paying on the other note, and I said I would; and in two or three days he brought me the note sued on, and I let him have the money. Ohm, the defendant, was not present at this conversation, nor when Fischer brought me the note."

We fail to see wherein or how this evidence could possibly harm the appellant. No effort was made by the appellee to prove "the rate of interest" Fischer "was paying on the other note," so that, it seems to us, if the court erred in the admission of the testimony objected to, the error is entirely harmless, and we can not reverse a judgment for such an error.

The appellant complains of an instruction of the court to the jury trying the cause, as follows:

"If the note was for borrowed money, and the agreement of the parties was to have it written so as to bear 10 per cent., but by mistake the word 'interest' was left out, and Ohm knew that it was to bear 10 per cent., then you

should find for the plaintiff the amount of note and interest, less payment."

We find no error in this instruction. Indeed, it seems to us that as it was the duty and province of the court to construe and interpret the note or contract in suit, the court might well have gone further, and instructed the jury that the words and figures, "with 10 per cent.," as used in said note, meant that it should be paid with 10 per cent. interest, or with interest at the rate of 10 per centum per annum. This was certainly the meaning of the words, "with 10 per cent.," as used in the note in suit, and the court should have so instructed the jury. There was no necessity for any reformation of the note, for its terms were not ambiguous or uncertain as to the rate of interest the note should bear. Where there is no ambiguity in the written contract or note sued upon, the court must declare the legal effect of the instrument, and instruct the jury as to what it means. *Symmes v. Brown*, 13 Ind. 318; *Comer v. Himes*, 49 Ind. 482; *Lowry v. Megee*, 52 Ind. 107; *Morris v. Thomas*, 57 Ind. 316; *White v. Webster*, 58 Ind. 233.

The appellant's counsel insist, that the court erred in allowing the jury to inspect and examine the note in suit, after the trial of the case had been fully closed. We can see no error in this action of the court, and the appellant has failed to show us that he was injured thereby in any particular.

Finally, it is claimed that the general verdict was not sustained by sufficient evidence. But, construing the note in suit as we do, we think that the note, in and of itself, was sufficient evidence to sustain the general verdict.

In our opinion, no error was committed by the court in overruling the appellant's motion for a new trial.

The judgment is affirmed, at the appellant's costs.

Headrick v. Brattain.

HEADRICK v. BRATTAIN.

CHATTEL MORTGAGE.—*Tenant's Mortgage of Crops to be Raised.—Execution Creditor.*—A mortgage executed by a tenant on the crops to be raised by him on a tract of ground leased by him is valid against his execution creditors ; but they may sell the equity of redemption.

From the Henry Circuit Court.

M. E. Forkner and *E. H. Bundy*, for appellant.

W. M. Watkins, for appellee.

PERKINS, J.—Action to recover possession of personal property.

Answer :

1. The general denial ;
2. Property in a third person.

The suit was commenced on the 3d day of November, 1875.

The property sought to be recovered was the corn growing upon thirty-five acres of ground. It was planted by a tenant holding the land under a lease for five years from the 1st day of March, 1872. At the time of receiving the lease, the tenant executed a mortgage on the crops to be grown during the five years, as security for the rent of the premises, which mortgage was recorded.

The court tried the cause, made a special finding of facts, and announced conclusions of law thereon.

Among the conclusions of law, though not necessary to the determination of the suit, was this: that said mortgage was void as against an execution creditor of the tenant, on the ground that the property mortgaged was not in existence when the mortgage was executed.

The weight of authority would seem to be the other way.

In *Butt v. Ellett*, 19 Wal. 544, it is decided, that a mortgage of future crops can not operate at the time of its execution, because the crops are not then in existence, but

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that, as soon as the crops grow, the lien of the mortgage attaches. Herman Chat. Mort. 299, sec. 119.

We think the court erred in its conclusion, that the mortgage was void; but this error will not justify the reversal of the judgment, because, though the mortgage had become operative on the property, the equity of redemption therein was subject to sale on the execution.

The judgment in the cause is affirmed, with costs.

POLK v. NICKENS.

COSTS.—Replevin.—Reducing Justice's Judgment, in Circuit Court.—In an action before a justice of the peace, to replevy certain chattels, part only of which were found by the constable, judgment was rendered for the plaintiff for possession of the chattels found, and for ten dollars damages for those not found and for the unlawful detention. On appeal to the circuit court there was a verdict that the plaintiff was entitled to possession, that the chattels found were worth six dollars, and that those not found were worth four dollars. Judgment on the verdict, and for costs.

Held, that the defendant was entitled to recover his costs in the circuit court, he having appeared before the justice.

From the Warrick Circuit Court.

I. S. Moore, J. C. Denny and C. S. Denny, for appellant.

Howk, C. J.—In this action, the appellee sued the appellant, before a justice of the peace of Warrick county.

In his verified complaint, the appellee alleged, that he was the owner and entitled to the possession of "one white she hog and eight sucking pigs," of the value of eighteen dollars, of which the appellant had possession without right and unlawfully detained the same from the appellee, and that said property had not been taken by virtue of any execution or other writ against the appellee; wherefore, etc.

Before the justice, the appellant appeared to the appel-

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lee's action, and on the trial of the cause the justice rendered judgment, that the "she hog" belonged to the appellee, and that he retain the same for his own benefit, and that he recover of the appellant the sum of eight dollars for said eight pigs, which the constable failed to find, and two dollars damages for the detention of said property, and the costs of suit.

On appeal, the cause was tried by a jury in the circuit court, and a verdict was returned, as follows:

"We, the jury, find for the plaintiff, and that he is the owner and entitled to the possession of the sow and eight pigs, in the complaint mentioned, and that the sow is of the value of six dollars, and that the eight pigs are of the value of four dollars."

Thereupon the appellant moved the court to tax the costs in the circuit court to the appellee, "on the ground and for the reason" that the appellee's recovery in the justice's court had been reduced more than five dollars in the circuit court, which motion was overruled, and to this decision the appellant excepted and filed his bill of exceptions. The court then rendered judgment on the verdict, and in favor of the appellee, for the entire costs of suit, and to the entry of judgment taxing him, the appellant, with the costs in the circuit court, he objected and excepted, and appealed from said judgment to this court.

Errors have been assigned by the appellant in this court, which call in question the decisions of the circuit court, in overruling his motion to tax the costs in that court against the appellee, and in rendering judgment for those costs against the appellant.

In section 70 of the act defining the jurisdiction, powers and duties of justices of the peace in civil cases, approved June 9th, 1852, it is provided as follows:

"Sec. 70. Costs shall follow judgment in the court of common pleas, or circuit court, on appeals with the following exceptions:

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“*First.* If either party against whom judgment has been rendered, appeal and reduce the judgment against him five dollars or more, he shall recover his costs in the court of common pleas, or circuit court, when the appellant appeared before the justice.” 2 R. S. 1876, p. 627.

It will be seen from our statement of this case, that “the appellant appeared before the justice,” and that, on his appeal to the circuit court, he reduced the justice’s judgment against him six dollars. By the letter of the statute, therefore, the appellant ought to have recovered his costs in the circuit court. We know of no legal grounds, on which the decisions of the circuit court, in overruling the appellant’s motion to tax the costs of that court against the appellee, and in rendering judgment for said costs in favor of the appellee and against the appellant, can be sustained. These decisions of the circuit court were clearly erroneous. *Robinson v. Skipworth*, 23 Ind. 311; *Crist v. Glidewell*, 25 Ind. 396; *Castle v. House*, 41 Ind. 333; and *Brown v. Duke*, 46 Ind. 343.

The judgment as to the costs is reversed, at the appellee’s costs, and the cause is remanded with instructions to render judgment, in favor of the appellee, for the amount of the verdict and interest, and his costs before the justice of the peace, and in favor of the appellant for his costs in the circuit court.

THE STATE v. ZEITLER.

LIQUOR LAW.—*Affidavit.*—*Sale to Person in the Habit of Becoming Intoxicated.*—*Quantity.*—An affidavit for an alleged unlawful sale of intoxicating liquor must, to be sufficient, aver the sale of some particular quantity less than a quart, even where the sale is alleged to have been made to a person in the habit of becoming intoxicated.

From the Elkhart Circuit Court.

The State v. Zeitler.

T. W. Woollen, Attorney General, *J. M. Vanfleet* and *E. C. Bickel*, for the State.

M. F. Shuey, for appellee.

BIDDLE, J.—Prosecution for unlawfully selling intoxicating liquor, commenced before a justice of the peace.

The affidavit is in the following words:

“August 2d, 1878. Now comes Julia Whiting, and files her affidavit, that, on the 1st day of July, 1878, at and within said county, John Zeitler did unlawfully sell spirituous, vinous and malt liquors to Adam Whiting, a person in the habit of being intoxicated, for the price of five cents; said defendant having received notice in writing, of September 12th, 1877, from the wife of said Adam, that he was in the habit of being intoxicated.”

Conviction before the justice; appeal to the circuit court, wherein, upon motion of the appellee, the cause was dismissed.

The State appealed.

The defect alleged against the affidavit is, that it does not state the quantity of intoxicating liquor sold. The State insists, that this averment is not necessary. The argument of the counsel is, that, as section 10, 1 R. S. 1876, p. 871, upon which this prosecution is founded, does not mention any given quantity of liquor, it is not necessary to aver it. The statute, however, does not declare any sale of intoxicating liquor unlawful, except a sale of a less quantity than a quart at a time. Sec. 1.

We, therefore, can not hold any sale unlawful, unless it is for a less quantity than a quart at a time, whether made to a person in the habit of being intoxicated or to a minor or any other person. This would be to create a criminal offence by construction, which is beyond our power. And it may be laid down as a general rule in criminal pleading, that, when either time, place, quantity or value

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is an ingredient in an offence, it must be averred, or the pleading will be bad.

We could not hold the affidavit in this case sufficient, without impairing, modifying or overruling the following cases: *Rosenbaum v. The State*, 4 Ind. 599; *Brutton v. The State*, 4 Ind. 601; *Cool v. The State*, 16 Ind. 355; *Haver v. The State*, 17 Ind. 455; *Walker v. The State*, 23 Ind. 61; *State v. Mondy*, 24 Ind. 268; *Manville v. The State*, 58 Ind. 63.

And if the question was still open, as now advised, we should adopt the same rule.

The judgment is affirmed.

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JUDGMENT.—Action Upon.—A judgment is a debt of record, upon which an action may be maintained, either in the court which rendered such judgment or in any other court of competent jurisdiction; and the judgment plaintiff may at once renew his action, *ad infinitum*, upon each successive judgment thus recovered.

63	443
161	50

SAME.—Last Judgment Merges Preceding.—Where a judgment is thus recovered upon a judgment, the latter is merged in the former, and all of its liens or priorities are released.

SAME.—Lien.—Execution.—Injunction.—Where a judgment is recovered in a court of competent jurisdiction in another State, upon a judgment previously rendered in this State, the latter is merged in the former, all of its liens or priorities upon lands in this State are abandoned, and the owner of such lands may enjoin a sale of the same upon an execution issued thereon.

From the Union Circuit Court.

L. H. Stanford, J. E. Tucker and C. L. Seward, for appellants.

C. H. Burchenal and B. Burke, for appellees.

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Howk, C. J.—In this action the appellees, as plaintiffs, sued the appellants, as defendants, in a complaint of two paragraphs.

In the first paragraph of their complaint the appellees alleged, in substance, that, on the 25th day of March, 1869, Louis Stix, Joseph L. Swartz and Nathan Stix, partners under the name of Louis Stix & Co., in the court of common pleas of Union county, Indiana, recovered a judgment against one Louisa J. Johnson for the sum of five hundred and eighty-four dollars and twenty-nine cents, and the costs of suit, which judgment was duly entered on the order book and judgment docket of said court; that, at the time of the rendition of said judgment, said Louisa J. Johnson, as the widow of one Robert B. Johnson, late of said county, deceased, was the owner of the undivided one-third part of certain real estate, particularly described, in said Union county, of which said Robert B. Johnson was seized at the time of his death; that, on the 28th day of July, 1869, the administrator of said Robert B. Johnson, deceased, by virtue of an order of said court of common pleas, sold the undivided two-thirds part of the different parcels of said real estate to certain persons named in said paragraph, and executed to said several purchasers deeds of conveyance therefor; that the said Louisa J. Johnson at the same time sold and conveyed, by good and sufficient quitclaim deeds, her undivided one-third part of said several parcels of said real estate to the same purchasers; that afterward, by virtue of sundry conveyances made by the said several purchasers, the appellees became the owners, in fee-simple, of all the said several parcels of said real estate; that, after the execution of the said several conveyances by said Louisa J. Johnson, and while the said judgment against her remained unsatisfied, to wit, on the — day of —, 18—, the said Stix & Co., being the owners and holders of said judgment, took a certified

transcript thereof, and brought suit thereon in the court of common pleas of Warren county, in the State of Ohio, having jurisdiction of the said cause of action, against the said Louisa J. Johnson; that said Louisa J. Johnson appeared to and defended said action, and such proceedings were therein had, as that, on the 25th day of March, 1876, a judgment was therein rendered by said last named court against said Louisa J. Johnson for the sum of eight hundred and twenty-nine dollars and seventy eight cents, being the amount of the principal, interest and costs accrued on said first named judgment; and that then and there and thereby the said first named judgment became and was merged in said last named judgment, and thereby became and was and still was wholly satisfied and discharged; that said last named judgment had since been credited with the sum of four hundred dollars, paid July 28th, 1876, by said Louisa, but the residue thereof remained unsatisfied and in full force, in said Warren county, Ohio; that, notwithstanding the said merger, satisfaction and discharge of said first named judgment, the said Louisa J. Johnson, for the purpose of oppressing the appellees, and causing the whole or a part of said judgment to be made out of the property of the appellees, instead of paying the same, procured the appellant Charles L. Seward, who then and there had full knowledge of all said facts, to pay said Stix & Co. a sum of money, or make some arrangement, in consideration whereof said Stix & Co., on the 28th day of August, 1876, executed to the appellant Seward an assignment of said first named judgment, which assignment was attached to the record thereof; that the appellant Seward, in furtherance of said purpose, had caused an execution to be issued on said judgment, out of the clerk's office of the court below, which execution came to the hands of the appellant Gould, as sheriff of said county, on the 29th day of August, 1876; that the said Gould, as such

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sheriff, by the procurement of said Seward, had levied said execution on the undivided one-third part of each of said parcels of real estate, as the property of said Louisa J. Johnson, and had advertised said real estate, according to law, to be sold as the property of said Louisa J. Johnson, by virtue of said execution, at the court-house door of said county, on the 1st day of November, 1876, and, unless restrained by said court, he would sell, at said time and place, the said undivided one-third part of said parcels of real estate, and apply the proceeds to the payment of said judgment; that such sheriff's sale would cast a cloud upon the appellees' titles to such real estate, and would impair the value and salableness thereof, and would inflict great injury on each and all of them; and the appellees prayed for a temporary restraining order, and, upon the final hearing, for a perpetual injunction against the appellants and each of them, etc.

The second paragraph of the complaint set up substantially the same facts which were alleged in the first paragraph thereof, and, in addition thereto, the appellees alleged, in said second paragraph, in substance, that, when the said Stix & Co. brought suit on the certified transcript of their first described judgment, against said Louisa J. Johnson, in said court of common pleas of Warren county, in the State of Ohio, they, the said Stix & Co., filed an affidavit in said suit, and thereon sued out an order of attachment against the property of said Louisa J. Johnson, directed to the sheriff of said Warren county; that, by virtue of said order of attachment, the said sheriff, on the 13th day of May, 1871, in accordance with the laws of said State of Ohio, seized and attached the undivided interest of said Louisa J. Johnson in certain real estate in said Warren county, then and there of the value of eight hundred dollars, and then and there appraised at said sums, and made due return of said order of attachment, with

his said proceedings endorsed thereon, on the 15th day of May, 1871; and that afterward, on the 26th day of July, 1876, the said Louisa J. Johnson having on that day obtained a credit of four hundred dollars on said judgment against her, in the court of common pleas of said Warren county, it was then and there, by the consent of all the parties to said judgment, ordered by said court, that the residue of the property attached in said suit should be released and discharged from all claims thereon of said judgment plaintiffs, by virtue of said proceedings in attachment. Wherefore, etc.

To each of said paragraphs of complaint the appellants demurred, upon the ground that it did not state facts sufficient to constitute a cause of action, nor to entitle the appellees to the relief prayed for therein, either in law or equity, which demurrers were severally overruled, and to these decisions the appellants excepted.

The appellants jointly answered the appellees' complaint by a general denial thereof.

The issues joined were tried by the court, without a jury, and a finding made for the appellees.

The appellants' motions for a new trial, and in arrest of judgment, were severally overruled, and to each of these decisions the appellants excepted; and judgment was rendered for the appellees, as prayed for in their complaint.

In this court, the appellants have assigned the following alleged errors of the court below:

1. That the appellees' complaint did not state facts sufficient to constitute a cause of action;
2. The circuit court erred in overruling the appellants' demurrer to the original complaint;
3. The circuit court erred in overruling the demurrers to the first and second paragraphs of the complaint;
4. The circuit court erred in overruling the appellants' motion for a new trial;

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5. The circuit court erred in overruling the appellants' motion in arrest of judgment; and,

6. The circuit court erred in granting the injunction set out in the record.

The main question presented for decision by the record of this action, and the appellants' assignment of errors thereon, may be thus stated:

Was the judgment first rendered in the court of common pleas of Union county, in this State, in favor of said Louis Stix & Co. and against said Louisa J. Johnson, so merged and absorbed in the judgment afterward rendered thereon in the court of common pleas of Warren county, in the State of Ohio, as to destroy the lien, vitality and other qualities of the first named judgment?

It seems very clear to us, that this question must be answered in the affirmative. A judgment is a "debt of record;" and, whether foreign or domestic, an action may be maintained thereon for the recovery of such debt, even where it might appear that the judgment plaintiff could enforce the collection of his judgment by an execution issued out of the court in which it was rendered. *Davidson v. Nebaker*, 21 Ind. 334. The judgment plaintiff, of course, controls his judgment. He may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he may elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment; but the very freedom with which this may be done, *ad infinitum*—and we know of no law or legal principle which would prevent its unending repetition—is, to our minds, a convincing and conclusive reason why each successive personal judgment ought to and must

be regarded as a complete merger and extinguishment of the preceding judgment, with all its qualities and incidents. Each successive personal judgment is a new "debt of record," in which the precedent debt, though theretofore evidenced by a judgment, is as completely merged and absorbed as it would have been if it had been evidenced by note, bill, bond, or any other evidence of debt. If the precedent judgment is merged, as we think it must be, in the succeeding judgment, then it follows of necessity, as it seems to us, that the former judgment is completely extinguished. It has ceased to exist for any purpose; it can not be used again as the foundation of another action, and all its qualities and incidents are lost and swallowed up in the judgment obtained thereon. This is so, without regard to the "dignity" of the courts in which the respective judgments may have been rendered. The modern, and we think the better, doctrine on the subject under consideration is thus stated in Freeman on Judgments, sec. 215:

"The new judgment, though inferior as an instrument of evidence to the old one, and not attended by the same liberal, jurisdictional presumptions, ought, nevertheless, to entirely supplant the old one, because it is the most recent judicial determination of the rights of the parties, and because the plaintiff has voluntarily elected to abandon his former judgment to secure one which, though in an inferior court, is conclusive in favor of the continuance and amount of his claim."

In section 216 of the same excellent treatise, it is further said:

"The weight of authority in the United States shows that whatever may be a cause of action will, if recovered upon, merge into the judgment or decree. A contract by specialty merges into a judgment in the same manner as a simple contract. A judgment is extinguished

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when being used as a cause of action, it grows into another judgment."

It is further said, in section 388 of the same treatise, that "The merger occasioned by one judgment being recovered upon another, as it extinguishes the judgment sued upon, as a cause of action, also destroys its effect as a lien."

In support of the conclusion we have reached in the case at bar, the appellees' counsel have referred us, in their able and exhaustive brief, to the following authorities, which we have found upon examination to be fairly in point, and therefore cite them: *Purdy v. Doyle*, 1 Paige, 558, 561; *Denegre v. Haun*, 13 Iowa, 240; *Whiting v. Beebe*, 7 Eng. 421, 549; *Chitty v. Glenn*, 3 Mon. 425; *Frazier v. McQueen*, 20 Ark. 68; *Neale v. Jeter*, 20 Ark. 98; *Bank of the U. S. v. Patton*, 5 How. Miss. 200; and *Brown v. Clarke*, 4 How. U. S. 4.

We are aware that there are respectable authorities, which are in conflict with our conclusion in this case; but it has seemed to us, after a careful consideration of the main question involved, that our decision thereof is in harmony with and supported by the weight of modern authority, that it is just and right in principle, and that, as a rule of law, it will best subserve and protect the rights of all parties.

The appellants' counsel have laid great stress, in their argument, upon the case of *Stockwell v. Walker*, 3 Ind. 215; but the point in judgment in that case is not in conflict with our decision of this case. In the case cited, a judgment had been revived upon a *scire facias*, and the real question for decision was, whether or not the original judgment was merged in the judgment of revivor, and the court, very properly we think, decided that it was not so merged. The judgment of revivor simply revived, or gave vitality to, the original judgment. The judgment of revivor did not become a new debt of

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record, but merely revived the old debt of record. This latter doctrine was recognized and approved by this court, in the more recent case of *Armstrong v. McLaughlin*, 49 Ind. 370; but, in this latter case, it is apparent we think, from the language of the opinion, that if the record had shown that a new judgment had been rendered on the old judgment, as a cause of action, the court would then have held that the old was merged in the new judgment.

In our opinion, the appellees' complaint, in the case now before us, stated facts sufficient to constitute a cause of action, and therefore the court did not err in overruling either the demurrers to the complaint or the motion in arrest of judgment.

In their argument of this cause, the appellants' counsel, in considering the alleged error of the court in overruling their motion for a new trial, insist, that the court erred in admitting in evidence the certified transcript of the judgment of the court of common pleas of Warren county, Ohio. But the appellants have failed to point out any objection, and we can see none, to the admission of this transcript in evidence.

We find no error in the record of this cause, of which the appellants can justly complain.

The judgment is affirmed, at the appellants' costs.

Petition for a rehearing overruled.

HERSHMAN v. HERSHMAN.

CONVEYANCE.—Condition Subsequent.—Complaint to Cancel Deed and Recover Land.—Demurrer.—Relief Regardless of Prayer.—Account for Rents, Improvements, etc.—Measure of Damages.—A warranty deed, conveying certain lands, contained this stipulation: "This deed is upon * * *

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condition that the grantor * * * agrees to make her home with the" grantee, who "agrees to provide for and take care of the grantor during her natural life, and to be at all expense that may necessarily accrue for the maintenance of the" grantor. An action was instituted by the grantor, against the grantee, wherein the complaint alleged, that, commencing with a certain date, the grantee had "failed to provide for and support her, as required by the deed." Prayer, in one paragraph, that the deed be cancelled, and, in another paragraph, that the grantee be decreed a trustee of such land, required to give bond, and to account, etc.

Held, on demurrer, that the complaint is sufficient.

Held, also, that no question upon the uncertainty of the averments of the complaint is presented by the demurrer.

Held, also, that, regardless of the prayer of the complaint, the court may grant any relief to which, under the issues, the plaintiff is entitled.

Held, also, that such deed was upon a condition subsequent.

Held, also, that, for a failure by the grantee to perform such condition, the grantor may recover the real estate so conveyed, and have an account taken, charging the grantee with the rents of the whole tract conveyed, including any portion cleared by him, and crediting him with the value of improvements made, rents paid, and any partial performance, by him.

SAME.—Notice.—Estoppel.—A person contracting with the grantee of such deed, upon the faith of the arrangement between the grantee and grantor, is bound to take notice of such condition subsequent.

PRACTICE.—Venire de Novo.—Verdict.—A venire de novo is only awarded when the verdict is uncertain, or fails to find upon all the issues, or to assess damages.

SAME.—Special Verdict.—Where both a general and special verdict is found, and the former finds, though only inferentially, upon all the issues, it is not necessary to the validity of the latter that it find upon the whole case.

SAME.—Form of Verdict.—Failure to Instruct Jury.—Where, in such case, the jury has not been instructed as to the form of their verdict, the joinder of their general and special verdict does not invalidate either.

SAME.—Judgment non Obstante.—Judgment on the special verdict, notwithstanding the general verdict, can be had only where the former is repugnant to the latter.

· From the Hamilton Circuit Court.

D. Moss and *T. J. Kane*, for appellant.

J. W. Evans and *R. R. Stephenson*, for appellee.

PERKINS, J.—Susannah Hershman executed to Charles Hershman a deed, of which the following is a copy:

"This indenture witnesseth, that Susannah Hershman,

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of Hamilton county, in the State of Indiana, convey and warrant to Charles Hershman all my interest in and to the real estate below described, of Hamilton county, in the State of Indiana, for the sum of one dollar, the receipt whereof is hereby acknowledged, the following real estate in Hamilton county; State of Indiana. to wit: The west half of the north-east quarter, and the east half of the north-west quarter, of section No. thirty-three (33), in township No. twenty (20) north, of range four (4) east, one hundred and sixty acres; also, beginning at the south-west corner of the south-east quarter of section No. twenty-eight (28), township No. twenty (20) north, of range No. four (4) east, thence east forty-two (42) rods, to a stone marked C. No. 1, witnessed by a stone marked W. south 14 links; thence north 38 rods and 2 links to a stone marked C. 2, witnessed by a stone marked W. west 14 links, thence west forty-two (42) rods to a stone marked C. 3, witnessed by a stone marked W. N. 2 links, thence south to the place of beginning; containing in all one hundred and seventy acres. This deed is upon this condition, that the grantor, Susannah Hershman, agrees to make her home with the said Charles Hershman, and the said Charles Hershman agrees to provide for, and take care of, the grantor during her natural life, and to be at all expense that may necessarily accrue for the maintenance of the said Susannah."

Dated the 14th day of June, 1870.

This deed was duly executed and recorded.

The complaint in this suit alleges in its first paragraph, that said Susannah, on the day of the date of said deed, put said Charles Hershman in possession of the land described in it, and commenced to reside with him, and continued so to reside till the 1st day of August, 1874, but that he failed to provide for and support her, as required by the deed, and she prays that it may be cancelled, etc.

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In a second paragraph, the same general facts are alleged, and the paragraph closes with a prayer, that the said Charles Hershman be decreed a trustee of said land, and required to give bond, and account, etc.

A common count for services, etc., is added, as a third paragraph.

Demurrers to these paragraphs, for want of facts, were overruled, and exceptions entered.

Answer in two paragraphs :

1. General denial ;
2. In confession and avoidance.

Reply in general denial to the second paragraph.

Trial by jury. Verdicts for plaintiff, as follows :

“ We, the jury, find for the plaintiff, and assess her damages at three hundred and eighty-six dollars.

“ J. E. WHISTLER, Foreman.

“ And we, the jury, find the following special verdict, in addition to our general verdict :

“ 1. We find, that the plaintiff conveyed to the defendant the lands described in the complaint, for the sole and only consideration that the defendant agreed, in consideration of said conveyance to him, to provide for and take care of her, during her natural life, at the defendant's home, and be at all expenses that might necessarily accrue for the maintenance of the plaintiff ;

“ 2. We find that the plaintiff fully performed all the conditions of said contract on her part ;

“ 3. That the defendant has failed, ever since the 23d of December, 1870, to perform said contract on his part ;

“ 4. We find that the consideration of said conveyance has wholly failed ;

“ 5. We find, that, on the 26th day of August, 1874, the plaintiff, in order to be provided with a comfortable home, was compelled to leave and did leave the house of the defendant, and has ever since remained away ;

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“6. We find that the rents and profits of said land, since the date of said deed, are worth, in gross, nine hundred dollars, and that the defendant has had the full benefit of the same;

“7. That the services rendered and goods furnished by the defendant to the plaintiff, under said contract, are of the reasonable value of two hundred and eighty dollars;

“8. That the plaintiff is entitled to have said contract rescinded, and to have the title to said land restored and reinvested in her;

“9. We, the jury, find for the defendant \$234 for improvements. J. E. WHISTLER, Foreman.”

This was on the 1st day of October, 1875.

On the next day, October 2d, the defendant moved for a *venire de novo*, which motion was overruled, and exception reserved.

A motion for a new trial followed, was overruled, and exception reserved.

At this point the plaintiff moved for a judgment in her favor on the special findings, but it was overruled, and exception saved.

The defendant then moved for a judgment in his favor for two hundred and thirty-four dollars on the special findings, but it was overruled, and he excepted.

The court thereupon rendered the following judgment and decree:

“And now, on plaintiff’s motion, it is ordered, adjudged and decreed by the court, that the plaintiff recover of the defendant the sum of three hundred and eighty-six dollars, being the amount of damage assessed by the jury herein. And it is further ordered and decreed by the court, that all the defendant’s estate and interest to and in the following described land, situate in Hamilton county, Indiana, be declared forfeited from him, and the title thereto reinvested in the plaintiff, to wit, ‘the undivided one-third

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part of the west half," etc. [Here follows the description in the deed.] "It is further ordered, adjudged and decreed by the court, that the deed of conveyance to said lands, made by the plaintiff to the defendant, on the 14th of June, 1870, be set aside and held for naught, as fully as if the same were never made; and the plaintiff's title to the lands hereinbefore described, which were conveyed by said deed, be forever quieted as to all claims or interest held therein by the defendant, and the cloud cast thereby on the title thereon by said deed be removed."

And it is further ordered that the plaintiff recover costs, etc.

An appeal was taken to the Supreme Court.

The errors assigned in this court are :

1. Overruling each of the several demurrers to the paragraphs of complaint;
2. Overruling the motion for a *venire de novo*;
3. Overruling the motion for a new trial;
4. Overruling appellants' motion for judgment on the special findings, notwithstanding the general verdict; and,
5. Rendering judgment for the appellee on the general verdict of the jury.

The appellee has assigned as cross errors :

1. That the court erred in overruling her motion for a personal judgment against the appellant for six hundred and twenty dollars;
2. In refusing to render judgment in her favor against the appellant for six hundred and twenty dollars, upon the special verdict and finding of the jury, and she asks this court to direct the court below to pronounce a personal judgment in her favor, against the appellant, for said sum.

Before proceeding to consider the particular questions discussed in this case by counsel, we may properly lay down some general, undisputed propositions :

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1. The deed in this case, made by appellee to appellant, was upon conditions subsequent. *Cross v. Carson*, 8 Blackf. 138; *Hankins v. Lawrence*, 8 Blackf. 266; *Hefner v. Yount*, 8 Blackf. 455.

2. Upon a failure to perform the conditions subsequent, the estate conveyed upon such conditions or condition became forfeited, and might be recovered by the grantor. *Scott v. Stipe*, 12 Ind. 74; *Leach v. Leach*, 10 Ind. 271; *Leedy v. Crumbaker*, 13 Ind. 523.

3. Upon setting aside such conveyance, in a suit for that purpose, on account of the forfeiture, an account may be taken. *Leach v. Leach*, 4 Ind. 628. In this case it is said :

“ Upon setting aside the conveyance it was proper to take an account. The defendant should be allowed for the money consideration, so far as he could prove he had paid it, with interest ; for the improvements made, and all rents paid ; and should be charged with the rents of the whole farm, including that portion by him cleared, from the time he went into possession of it. This is the proper and only mode of restoring the parties to their original situation.” See *Thompson v. Thompson*, 9 Ind. 323; *Blossom v. Ball*, 32 Ind. 115.

4. On the forfeiture, by breach of conditions subsequent, the same estate conveyed, be it large or small, returns to the grantor in the conveyance. *Scott v. Stipe*, 12 Ind. 74.

We proceed to the consideration of the errors assigned :

1. The demurrers were properly overruled to the paragraphs of the complaint. The objection made by counsel in argument, to the first paragraph, is want of certainty. The paragraph was sufficiently certain to withstand a demurrer. A motion that it be made more certain was not interposed. The objection urged to the second is, that its prayer was not appropriate. Where an issue is made and

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tried in a cause, the court may grant any relief consistent with the case made by the complaint and embraced within the issue, without regard to the prayer for relief in the complaint. 2 R. S. 1876, p. 188, sec. 380, and notes. No objection is seriously urged to the third paragraph.

2. There was no occasion for a *venire de novo*. This writ issues when the verdict is uncertain, or finds less than the issues, or fails to assess damages. The verdict in the case before us is certain; it finds the whole of the issues, and assesses damages. It is composed of two parts, viz., a general verdict upon all the issues, and a special verdict finding facts.

The general verdict being a finding upon all the issues, it was not necessary to the validity of the special verdict that it should find upon the whole case. Had there not been a general verdict, it would have been different. *Morse v. Morse*, 25 Ind. 156.

As there was no instruction by the court as to the form of the verdict, this joining the two in one did not vitiate it, and it was not objected to on this ground. See *Skillen v. Jones*, 44 Ind. 136.

The general verdict was for the plaintiff, upon all the issues. It found by implication, that, as to the estate held upon condition subsequent, the condition had been broken, and, as a consequence, the estate forfeited; it found in like manner the alleged defences unsustained by evidence, and it found damages.

The special verdict found facts. And the question now is, are they repugnant? If the special finding of facts can, upon any hypothesis, be reconciled with the general verdict, the latter must stand. *Amidon v. Gaff*, 24 Ind. 128; 2 R. S. 1876, p. 172, and notes.

The special finding in this case is in perfect accord with the general verdict. An examination of them will satisfy any one of this.

In the matter of damages we may observe, that the amount found in the general verdict was.....	\$386
In the special finding of facts, it is stated, that the defendant (appellant) received, of rents,.....	900
That he had made improvements of the value of.....	280
That he had a claim against plaintiff (appellee) of...	234

Making, in the aggregate, credits to the amount of...	\$514
Which, subtracted from rents, leaves.....	\$386

the amount of the verdict.

3. The ground of the motion for a new trial was, that neither the general nor special verdict was sustained by evidence.

The evidence was conflicting. We can not say it did not justify the verdicts.

4. As we have seen, the general and special verdicts were not repugnant.

5. As to rendering judgment on the general verdict, the statute enacts, 2 R. S. 1876, p. 186, secs. 370, 371, that, "When a trial by jury has been had, and a general verdict rendered, the judgment must be in conformity to the verdict.

"Where the verdict is special, or where there has been a special finding on particular questions of fact, the court shall render the proper judgment."

There is nothing in the cross errors assigned.

One other question may properly be noticed. It is claimed, that the plaintiff (appellee) was estopped to claim the forfeiture of the land in question in this case, on breach of the conditions subsequent, for the reason that, at the time she made the deed containing such conditions, property was exchanged and money passed between Charles Hershman, appellant, and his brother, one James K. Hershman, with mutual knowledge and consent of the parties, on the faith of the arrangement between the appellant and appellee.

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These alleged facts were set up in a paragraph of answer, upon which issue was taken, and the general verdict of the jury was against the defendant (appellant), on the answer. This, in legal effect, found, that there was no such understanding or knowledge, as alleged in the answer. Besides, said James K. Hershman was not a party to this suit. Nor do we now decide, that, had the facts alleged in the paragraph of answer existed, any estoppel upon the appellee to claim the forfeiture created by the wrongful act of the appellant, was created. Both brothers would be bound to take notice of said conditions. The judgment is affirmed, with costs.

63	460
129	245
63	460
135	161
135	167
63	460
139	53

THE PEOPLES SAVINGS BANK OF EVANSVILLE v. FINNEY ET AL.

SUPREME COURT.—Co-Parties.—Notice of Appeal.—Waiver.—Foreclosure of Mortgage.—The payee of several promissory notes endorsed the note first maturing to A., the note next maturing to B., and retained those last maturing himself; A. brought suit against the payee and mortgagors for foreclosure; B. and the payee then jointly sued A. and the mortgagors for foreclosure; afterward, by order of court, the two causes were consolidated into one action, and the several statements of the causes of action in the respective complaints were ordered to “stand as the complaint in the consolidated action,” and, without forming any issue, the mortgagors were defaulted, personal judgments on the notes rendered against them, and foreclosure decreed giving priority to A., B and the payee, in the order named; subsequently B. and the payee filed a cross complaint against A. only, for foreclosure of the same mortgage, asking priority over A., on the ground, that, for a good consideration, he had extended the time of payment of the note held by him; on the motion of B. and the payee the original judgment was vacated, without any plea by A., other than a demurrer to such cross complaint, and without any notice to or appearance by the mortgagors, and the various actions were again consolidated, personal judgments again rendered on the notes, against the mortgagors, and foreclosure decreed, giving priority to B., the payee and A., in the order named.

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Held, on appeal by A. to the Supreme Court, that the mortgagors were not co-parties with him, within the meaning of section 551 of the practice act. *Held*, also, that, after the submission of such cause by agreement of parties, and after notice to the appellees that the cause had been distributed for decision, a motion by them to dismiss the appeal for want of notice thereof to the mortgagors should be overruled.

*SAME.—Priorities of Separate Promissory Notes Secured by same Mortgage.—*Several promissory notes, maturing successively and secured by the same mortgage on real estate, stand as so many successive mortgages, and have priority in the order in which they mature.

*SAME.—Extension of Time of Payment.—*The fact that the holder of the note first maturing grants to the mortgagor, upon a valuable consideration, an extension of time beyond the maturing of the succeeding notes, does not give the latter priority over the former.

From the Vanderburgh Circuit Court.

J. M. Shackelford and *R. D. Richardson*, for appellant.

G. Palmer, J. E. Williamson and *A. Brauns*, for appellees.

Howe, J.—On the 27th day of May, 1873, F. Anton Behme and Clemens Behme executed a mortgage conveying to the appellee Lorenzo L. Long the real estate in Vanderburgh county, Indiana, particularly described therein.

This mortgage was given to secure the payment of four promissory notes, of even date with said mortgage, each in the sum of \$800.00, executed by said mortgagors, and payable to the order of the appellee Long, on the 1st day of March, in the years 1875, 1876, 1877 and 1878, respectively.

It appears from the record of this cause, that the appellee Long endorsed to the appellant the first of these notes, maturing March 1st, 1875, and to his co-appellee, Francis Finney, the next two of the said notes, maturing respectively on the 1st days of March, 1876 and 1877 and that he, the appellee Long, was still the holder of the last note, maturing March 1st, 1878.

On the 23d day of January, 1877, the appellant commenced an action, in the court below, on the note so en-

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dorsed to it, and to foreclose the said mortgage, etc., making the said mortgagors and the said mortgagee, Long, as the supposed holder of all the other notes, parties defendants to its said action.

On the next day, January 24th, 1877, the appellees Finney and Long commenced a joint action, in the same court, on the said notes so held by them respectively, and to foreclose the said mortgage, etc., making the said mortgagors and the appellant as the holder of said first note parties defendants to their joint action.

Afterward, at the February term, 1877, of the court below, to wit, on the 14th day of February, 1877, the parties to said two actions appeared, and by order of said court the said two actions were "consolidated into one action."

It was further ordered, "that the several statements of the causes of action in the respective complaints stand as the complaint in the said consolidated action." Thereupon the mortgagors, F. Anton Behme and Clemens Behme, having been duly summoned, were called and defaulted, and the consolidated action was submitted to the court for trial by both the appellant and the appellees, without any pleadings or controversy as between themselves, upon their respective causes of action.

There was then, on said last named day, a finding and judgment, in favor of the appellant and each of the appellees, for the amount due on the note or notes held by each of them respectively, and for the foreclosure of said mortgage and the sale of the mortgaged property, etc.; and it was then ordered by the court, that the proceeds of such sale should be applied to the payment,—

- 1st. Of the appellant's said judgment and costs;
- 2d. Of the said judgment and costs in favor of the appellee Francis Finney;
- 3d. Of the said judgment and costs in favor of the appellee Lorenzo L. Long; and,

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4th. That the surplus, if any, should be paid to said mortgagors.

Neither the appellant nor the appellees, nor either of them, made any objection or saved any exception to the said judgment or orders of the court, or any of them, in the said two actions, or in the said consolidated action.

After the said two actions and the said consolidated action were thus apparently disposed of by the final judgment of the court therein, to wit, on the 5th day of March, 1877, the appellees filed in the court below what they term their cross complaint, against the appellant only, the said F. Anton Behme and Clemens Behme, the mortgagors, not having been made parties thereto. This so-called cross complaint was in two paragraphs, to each of which the appellant demurred, for the want of sufficient facts therein to entitle the appellees to the relief prayed for therein. These demurrers were severally overruled, and to these decisions the appellant excepted.

The appellant having failed to answer further the so-called cross complaint, on motion of the appellees and without any notice to or appearance by the said mortgagors, or either of them, the original judgment and orders of the court below in the said two actions and in the consolidated action were set aside and vacated. The two actions were then, by the order of the court, again "consolidated into one action," and the same judgments were rendered as before, in favor of the appellant and each of the appellees, for the amounts due on their respective notes, and for the foreclosure of said mortgage, etc.; but, by reason of the matters alleged in said so-called cross complaint, the court then ordered that the proceeds of the sale of said mortgaged premises should be applied to the payment,—

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1st. Of the judgment and costs in favor of the appellee Finney ;

2d. Of the judgment and costs of the appellee Long ;

3d. Of the appellant's judgment and costs ; and,

4th. That the surplus, if any, be paid to said mortgagors ;—

To which latter judgment the appellant excepted, and appealed therefrom to this court.

The appellant has assigned, in this court, the following decisions of the court below as errors :

1. In overruling its demurrers to the first and second paragraphs of the appellees' cross complaint ; and,

2. In rendering judgment in this action, giving to the appellees priority over the appellant.

Before considering the questions presented by these alleged errors, it is proper that we should dispose of a motion, recently made by the appellees, to dismiss the appeal in this cause. upon the ground that F. Anton Behme and Clemens Behme, who were defendants in the court below, were not made parties to said appeal.

In section 551 of the practice act, it is provided, that "A part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the Supreme Court." 2 R. S. 1876, p. 239. The appellees' motion to dismiss was made, apparently, upon the theory that the appellant and the Behmes were co-parties, and that, therefore, the latter ought to have been notified of this appeal. But the appellant and the Behmes were not co-parties in the consolidated action, as the appellant was a party plaintiff, both in its own action and in the consolidated action, while the said F. Anton Behme and Clemens Behme were defendants, in the separate and consolidated actions. It is clear, that the appellant and the Behmes were not co-parties in the consolidated action, in which

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the judgment appealed from was rendered ; and therefore it would seem that this case does not come within the letter of the statute cited.

The record of this cause, the appellant's assignment of errors thereon, and the joinder in error by the appellees, all appear to have been filed in this court on the 5th day of May, 1877 ; and, on the 30th day of the same month, the cause was submitted by the written agreement of the parties.

On the 28th day of June, 1878, this cause was distributed, in its order, for decision ; and after such distribution, and after the appellees had notice thereof, they filed their said motion to dismiss the appeal herein, upon the ground before stated. Under these circumstances, it seems to us, that the appellees' motion to dismiss this appeal, upon the ground stated, comes too late ; that, by their own previous action in the case, they had practically waived the objection now stated in their motion ; and that, for these reasons, their motion to dismiss ought to be and must be overruled. In our opinion, such a motion ought not to be sustained, unless it is made on the first appearance of the moving party, in this court, and especially so, when it appears, as it does in this case, that the parties to the record, who were not made parties to the appeal, have no interest whatever in the controversy in this court. The only controversy in this action, even in the court below, arose upon the appellees' so-called cross complaint ; and the appellees, as we have seen, did not make the said F. Anton Behme and Clemens Behme, or either of them, parties to said cross complaint. The same controversy, and none other, exists in this court ; and the said Behmes are not parties thereto, and have no interest therein.

The appellees' motion to dismiss this appeal, upon the ground stated in said motion, is therefore overruled.

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We come now to the consideration of the questions presented by the appellant's assignment of errors in this case.

The main question, thus presented, may be thus stated: Were the facts pleaded in either paragraph of the appellees' so-called cross complaint sufficient to entitle them, or either of them, to the relief prayed for therein? The facts relied upon by the appellees, in each of the two paragraphs of said cross complaint, are substantially the same; but, as these facts are more fully and clearly stated in the second paragraph than they are in the first, we give the substance of those facts as stated in said second paragraph, as follows:

"That the note held and sued on by the appellant did not become due and payable according to the tenor and effect thereof, nor until long after the three notes held by appellees had become overdue and payable, and the appellees respectively entitled to foreclose the mortgaged premises for such non-payment of the same, because they aver, that before said note of appellant would have matured according to its tenor, to wit, on the — day of February, 1876, the appellant, who was then the holder and owner of said note, by a binding agreement made with the mortgagors, and for a valuable consideration, namely, the payment of \$30, as and for interest at the rate of twelve per cent. per annum, agreed to and did extend the time of the note held by appellant, down to the 1st day of August, 1875, such day of payment being afterward further extended by the appellant, from time to time, in consideration of advance payments of interest, at a similar rate, down to the 1st day of October, 1876; that during all the time from the 1st day of March, 1875, when, but for such extension and agreement, the note held by appellant would have become payable, down to the 1st day of October, 1876, the appellant absolutely debarred and restrained herself from all right to demand or enforce the payment of her note, or

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to proceed to enforce her lien against the mortgaged premises; that such extension was granted without notice to appellees and without their knowledge or consent, they being, at the time, the holders of the notes respectively sued on by them, and that the appellee Finney had taken the two notes held by him in good faith, and for a valuable consideration, upon the representation and assurance of the appellee Long, and which Long believed to be true, that the note held by the appellant had been paid; that appellant, by reason of the premises, had waived all claims to priority, which it might otherwise have had against the mortgaged premises, and postponed its lien to that of appellees. Wherefore they pray, that their notes be first paid," etc.

We are very clearly of the opinion, that the facts thus stated by the appellees in their so-called cross complaint were not sufficient to entitle them or either of them to the relief prayed for therein.

It has long been the settled law in this State, that a mortgage given to secure the payment of two or more notes maturing at different dates must be considered as if there were as many different successive mortgages as there were of such notes, and that the holder of the note first due would have priority, and the holder of the other note or notes would come in, in the same order in which such note or notes matured. *The State Bank v. Tweedy*, 8 Blackf. 447; *Stanley v. Beatty*, 4 Ind. 134; *Hough v. Osborne*, 7 Ind. 140; *Murdock v. Ford*, 17 Ind. 52; *Sample v. Rowe*, 24 Ind. 208; *Davis v. Langsdale*, 41 Ind. 399, and *Minor v. Hill*, 58 Ind. 176.

In legal effect, therefore, the appellant and each of the appellees held and hold a separate mortgage on the same property, executed by the same mortgagors, at the same time. Of these separate mortgages, the appellant was the holder of the first or prior mortgage, while the appellee

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Finney and the appellee Long severally came in afterward, in the order in which they are named.

It is very certain, we think, that the appellant did not, by reason of the facts alleged in either paragraph of said so-called cross complaint, lose its right to priority of payment out of the proceeds of the sale of the mortgaged premises.

Under the law and the facts of this case, the appellees were severally mortgagees, junior in time to the appellant, and they did not and could not, by reason of the matters alleged, obtain any priority over the appellant.

In our opinion, the court below erred in overruling the appellant's demurrers to each paragraph of the appellees' so-called cross complaint, and in rendering judgment giving the appellees priority over the appellant.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to sustain the appellant's demurrer to each paragraph of the appellees' cross complaint.

Opinion filed at May term, 1878.

Petition for a rehearing overruled at November term, 1878.

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CITY.—*Complaint for Violation of Ordinance.*—A complaint for a violation of a city ordinance need not set out such ordinance either in substance or by copy, it being sufficient to describe the same by its section, number and date of adoption.

SAME.—*Powers of Common Council.*—*Licensing Auctioneers.*—Under clause 38, section 53, of the general law for the incorporation of cities, 1 R. S. 1876, p. 293, the common council of a city incorporated under such act has the power to adopt a penal ordinance, requiring an auctioneer to procure a license from the city.

SAME.—*Police Regulation.*—The power thus given to the common council is in the nature of a police regulation.

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SAME.—Auctioneer Defined.—A person who sells his own goods, as well as one who sells the goods of another, at public auction, is an auctioneer within the meaning of the statute.

PLEADING.—Uncertainty.—Demurrer.—Practice.—Uncertainty in a pleading which states sufficient facts can be reached only by a motion to make certain and not by demurrer.

SAME.—Justice of the Peace.—A complaint before a justice of the peace, which states facts sufficient to inform the defendant of the nature of the action and to authorize a judgment which will bar another action for the same cause, is sufficient.

From the Elkhart Circuit Court.

R. M. Johnson, J. D. Osborn and E. G. Herr, for appellant.

J. A. S. Mitchell, H. D. Wilson and I. H. Simmons, for appellee.

Howk, C. J.—In this action, the appellant sued the appellee, before a justice of the peace of Elkhart county, to recover a penalty for an alleged violation of a certain section of a certain ordinance of said city of Goshen.

The trial of the cause before the justice resulted in a verdict and judgment in favor of the appellant, from which there was an appeal to the court below.

In the circuit court the appellee demurred to the appellant's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court, and to this decision the appellant excepted. Thereupon the appellant moved the court for leave to amend its complaint, which was granted "upon the plaintiff submitting to judgment being entered in favor of the defendant for all costs taxed herein to this date," November 5th, 1875.

The appellant objected and excepted to any judgment being rendered against it for costs, except the costs of that term of court, and moved the court for permission to amend its complaint without being subjected to a judgment for costs, except the costs of that term, which mo-

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tion was overruled by the court, and to this ruling the appellant excepted.

On the appellee's motion, the court then rendered judgment in his favor, on his demurrer, for the costs of suit, from which judgment this appeal is now prosecuted.

The appellant has assigned, in this court, the following decisions of the circuit court, as errors :

1. In sustaining the demurrer to its complaint ;
2. In refusing to allow the appellant to amend its complaint upon paying the costs accrued in said cause at the term of court when the demurrer was sustained, and when the leave to amend was asked by the appellant; and,
3. In refusing to allow the appellant to amend its complaint unless it submitted to a judgment against it, the appellant, for all the costs that had theretofore accrued in the said cause.

We will consider these alleged errors, and decide the questions thereby presented, in their enumerated order.

1. In its complaint, the appellant alleged, in substance, that, on the 4th day of September, 1875, the appellee violated section 3 of ordinance No. 21, duly enacted and adopted on the 21st day of December, 1874, by the common council of said city of Goshen, duly incorporated under the general law of this State for the incorporation of cities, in this, to wit : That on said first named day, within the corporate limits of said city, the appellee did unlawfully exercise and perform the business of an auctioneer for the sale of goods, wares and merchandise, then and there belonging to, and in the possession of, the appellee, in the store-room occupied by him, in Thomas' block, on the east side of Main street, in said city, the said goods, wares and merchandise consisting of dry goods, notions, boots and shoes, and such other articles of personal property as were usually contained in a general retail dry-goods store; he, the appellee, being then and there neither an executor, ad-

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ministrator, or other officer of any court of law of this State, and said articles, so sold by him at auction as aforesaid, not being of the growth or manufacture of any citizen of Elkhart county, nor horses, cattle, hogs, sheep or other live-stock, nor farming utensils owned and manufactured by any citizen of said county, and the appellee not being then and there licensed thereunto, as such auctioneer, by the corporate authorities of said city, as by the ordinance of said city in such case made and provided, "and against the peace and dignity of said city." Wherefore the appellant prayed judgment against the appellee for one hundred dollars penalty, etc.

The controlling question in this case, as we understand it, may be thus stated:

Have the common council of a city incorporated under the general law of this State the power to regulate the sales of, and exact a license fee from, any one as an auctioneer, whose sales at auction are confined exclusively to sales of his own "goods, wares and merchandise?"

In the thirty-eighth clause of section 53 of the general law of this State providing for the incorporation of cities, it is provided, that "The common council shall have the power to enforce ordinances: * * * * *

"*Thirty-Eighth.* To regulate the sale of all kinds of property at auction in the streets, stores, shops, or elsewhere in the city, and to license auctioneers, and require them to pay a reasonable per cent. on the amount of sales." 1 R. S. 1876, p. 293.

Under this statutory power, the common council of the city of Goshen adopted section 3 of an ordinance No. 21, mentioned in the appellant's complaint, in which section it is ordained, that "Any person who shall exercise, within said city, the business of an auctioneer for any period of time, for the sale of goods, wares and merchandise, without having first obtained license, as provided

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hereinbefore, shall be fined in any sum not less than ten dollars nor more than fifty dollars, for each and every day, or fractional part thereof, he may so exercise said business." This section of said ordinance contained a proviso, which is not material to any question in this case, and need not be further noticed.

It is claimed by the appellee's attorneys, in their brief of this cause in this court, that the appellant's complaint is "fatally defective, for two reasons:

"1st. For what it fails to say; and,

"2d. For what it does state."

Under the first of these reasons the appellee's counsel say, that the complaint is defective, because the appellant failed to set out therein either the ordinance or the section or the substance of the section, claimed to have been violated by the appellee. In this respect the complaint was sufficient; it gave "the number of the section charged to have been violated, with the date of its adoption," and that was a compliance with the requirements of the statute. 1 R. S. 1876, pp. 273, 274, sec. 19; *The City of Huntington v. Pease*, 56 Ind. 305; and *The City of Huntington v. Cheesbro*, 57 Ind. 74.

It is further objected to the complaint, that it "states the pleader's conclusions, not his facts. It charges the defendant with violating an ordinance by exercising and performing the business of an auctioneer within said city, but states no fact or facts." It seems to us, that the complaint is not open to this objection; for, if the appellee performed the business of an auctioneer, he sold property by auction, and that fact is clearly charged. The charge would have been more specific, perhaps, if the complaint had stated the name of the person to whom the appellee sold the property. But, if the complaint were defective for the want of such a statement, the defect is one which could not be reached by a demurrer for the want of facts, but

only by a motion to make the complaint more specific. *Reynolds v. The State, ex rel. Titus*, 61 Ind. 392.

It is earnestly insisted by the appellee's counsel, that the appellant's complaint was bad on the demurrer thereto, because it was alleged in the complaint, that the goods, wares and merchandise, for the sale of which the appellee was charged with performing "the business of an auctioneer," were "then and there belonging to, and in the possession of, the defendant," the appellee. Upon this point, the argument of counsel is founded upon one of the definitions of the word "auctioneer," in Bouvier's Law Dictionary, as follows: "A person authorized by law to sell the goods of others at public sale." If the term "auctioneer" had no other meaning than the limited one thus given it, the argument of counsel would be, perhaps, well founded; but Bouvier also defines an auctioneer as "One who conducts a public sale or auction." In Burrill's Law Dictionary, an auctioneer is defined as "one who conducts an auction or public sale;" and again, as "A person who is authorized to sell goods or merchandise at public auction or sale, for a recompense, or (as it is commonly called) a commission." In Wharton's Law Dictionary, auctioneers are defined to be "licensed agents appointed to sell property and to conduct sales or auctions." In Webster's Dictionary, the meaning of the word "auctioneer" is thus given: "A person who sells by auction; a person who disposes of goods or lands by public sale to the highest bidder." In Worcester's Dictionary, the word "auctioneer" is defined as follows: "One whose business it is to offer property for sale by auction; one who invites bids at a sale by auction."

It will be seen by these various definitions of the word "auctioneer," by the best lexicographers, legal and otherwise, of our language, that it, as ordinarily used, has no such limited and confined meaning as the appellee's counsel have sought to give it. In the first rule prescribed by law

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in this State for the construction of statutes, it is provided, that "Words and phrases shall be taken in their plain, or ordinary, and usual sense." 2 R. S. 1876, p. 315, sec. 1. Under the allegations of the appellant's complaint, the appellee was an auctioneer, within the plain, ordinary and usual sense of that term, as used in the 38th clause of section 53 of the general law of this State for the incorporation of cities, *supra*, and in section 3 of said ordinance No. 21, adopted by the common council of said city of Goshen. The statute gives the common council the power to regulate, to prescribe rules for the government of, sales by auction within the city limits, and to require the auctioneer to procure a license for such sales; and the ownership of the property to be sold will not, and does not, in our opinion, affect, impair or prevent the exercise of these powers in any respect. The power given is in the nature of a police regulation, and it applies to all sales by auction, as well to those where the auctioneer sells his own property as to those where he sells the property of other persons. Under the power given by the statute, the appellant's common council adopted section 3 of said ordinance No. 21, which section made it penal for any person to exercise, within said city, the business of an auctioneer without first having obtained the proper license so to do from the appellant's corporate authorities.

In the appellant's complaint, the appellee was charged with a violation of said section 3, and, while the averments of the complaint were not so full and explicit as they might have been, yet we think they were sufficient to withstand the appellee's demurrer.

The suit, as we have seen, was commenced before a justice of the peace; and, in such a case, the complaint will be sufficient on demurrer for the want of facts, if it will inform the defendant of the nature of the plaintiff's cause of action, and be so explicit that a judgment in the suit may be used as a bar to another action for the same cause.

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This is the settled law of this State; and, applying it to the case at bar, we are clearly of the opinion, that the appellant's complaint fully informed the appellee of the nature of the appellant's cause of action, and was so explicit that a judgment in this suit would constitute a complete bar to another action for the same cause. *Powell v. DeHart*, 55 Ind. 94; *The United States Express Co. v. Keefer*, 59 Ind. 263; and *Hewett v. Jenkins*, 60 Ind. 110.

For the reasons given, we think that the court erred in sustaining the appellee's demurrer to the appellant's complaint

Having reached the conclusion that the appellant's complaint in this case stated facts sufficient to constitute a cause of action against the appellee, it is unnecessary for us to consider and determine the questions presented for decision by the other alleged errors. For, as we hold that the complaint is good on the demurrer thereto, the appellant will not be required to amend it, either on the terms prescribed by the court, or on the terms asked for by the appellant.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule his demurrer to the appellant's complaint, and for further proceedings.

THE STATE, EX REL. MASON, v. MILLER.

ATTACHMENT.—*Auxiliary Proceeding.*—An attachment under the statute of this State is not an independent proceeding, but is merely in aid of an action commenced concurrently with, or prior to, the attachment.

SAME.—*Appeal from Justice of the Peace.*—Where an appeal is taken to the circuit or superior court, from a judgment rendered by a justice of the peace in an action wherein a writ of attachment has been issued, the whole cause there stands for trial *de novo*.

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SAME.—*Appeal from Judgment in Attachment.—Case Modified.*—An appeal will not lie in such action from the judgment in attachment independently of the main action. *Theirman v. Vahle*, 32 Ind. 400, modified.

From the Marion Superior Court.

C. S. Denny, for appellant.

J. A. Pritchard, for appellee.

NIBLACK, J.—This was an application by the State, on the relation of Nathan Mason, for a writ of mandate against Thomas P. Miller, a justice of the peace.

An alternative writ was issued at special term, against the defendant, who appeared and demurred to the petition, and his demurrer was sustained.

The relator declining to amend his petition, final judgment was rendered for the defendant.

The plaintiff then appealed to the general term of the court below, where the judgment at special term was affirmed.

The plaintiff has further appealed to this court, and presents only the question of the sufficiency of the relator's petition.

The petition was as follows:

“Nathan Mason, on the relation aforesaid, respectfully represents to the court, that, on the 28th day of October, 1878, the defendant, Thomas P. Miller, who is a justice of the peace in and for the county of Marion, State of Indiana, rendered a judgment against this relator, for the sum of one hundred dollars (\$100), together with costs taxed at ——— dollars, in favor of John C. Kassabaum and William J. Probst; that in said proceedings said judgment plaintiffs filed an affidavit in attachment, by virtue of which they attached certain goods and chattels of this relator; that, on the day of said trial, said justice of the peace rendered a judgment in attachment against this relator, and entered an order directing said goods and chattels to be sold; that this relator afterward, to wit, on

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the — day of October, 1878, tendered to the said justice of the peace a good and sufficient appeal bond, which was in all respects satisfactory to the said justice of the peace, and then prayed an appeal from the said judgment in attachment to this court; but the said justice of the peace, without any good and sufficient reason therefor, refused and still refuses to send up a transcript in said cause, and therefore will not permit this relator to appeal from the said judgment in attachment, unless he will make his appeal bond cover, and his appeal apply to, the said personal judgment also.

“Wherefore he now prays, on the relation aforesaid, that this court will issue an order requiring the said Thomas P. Miller to appear before one of the judges thereof, at a time and place to be named in said order, then and there to show cause, if any there be, why he should not transmit the papers in said cause, together with a properly certified transcript thereof, to this court.”

It was held in the case of *The Excelsior Fork Company v. Lukens*, 38 Ind. 438, that “An attachment, under our statute, is not an independent proceeding, but one merely in aid of an action commenced concurrently with or before the proceedings in attachment. The object of it is to secure a lien upon the defendant’s property for the payment of any judgment which the plaintiff may recover in the main suit against him, or which any other party or parties may recover who file their claims under the proceeding.”

This definition of the auxiliary character of an attachment proceeding in this State is in harmony with several previous decisions of this court, and may, we think, be safely accepted as a substantially correct definition of the true nature of a proceeding in attachment under our present code. It follows, therefore, that there must first be a judgment *in personam*, or *in rem*, in the main action, be-

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fore there can be a judgment in attachment. When the main action is either defeated or dismissed, the attachment proceedings are at an end.

Acting apparently upon the construction of our statute given as above, this court, in the case of *Abbott v. Zeigler*, 9 Ind. 511, decided, as we construe the opinion in the cause to mean, that there could not be an appeal from the circuit court to the Supreme Court from an order or a judgment in an attachment proceeding until after final judgment in the main action, and then only in connection with the judgment in such main action.

In the case of *Theirman v. Vahle*, 32 Ind. 400, it was further decided, that when the entire record, including the main action as well as the proceeding in attachment, is before this court, error may be assigned upon the judgment in attachment alone, without involving the inquiry as to whether error may not have been committed in such main action.

In this latter case, the opinion pronounced in the case of *Abbott v. Zeigler*, *supra*, was disapproved, but, as it seems to us, without sufficient consideration. The conflict between the two cases is apparent only and not real, and, as above construed by us, both cases are recognized as authorities which we may safely follow in proper cases.

The appellant contends that the case of *Theirman v. Vahle*, referred to as above, decides that an appeal may be taken from the judgment in attachment, independently of the proceedings or judgment in the main action, but we do not so construe the opinion in that case, when considered with reference to the record which was before the court at the time, and, if the language used justified such a construction, we could not follow it as applicable to the case at bar.

Upon an appeal to a circuit or a superior court, from the judgment of a justice of the peace, the cause stands for

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trial *de novo* in the court to which the appeal is taken, and in order to give the latter court jurisdiction *de novo*, it would seem inevitable that the appeal must bring the whole cause before it. Limited or partial appeals to the Supreme Court are sometimes permitted, but we know of no such provision as applicable to appeals from a justice of the peace, and do not see how such a provision could be made effective where the cause stands for trial *de novo* in the appellate court.

After a careful review of the record before us, we have come to the conclusion, that the appellee, Miller, did not violate any right of the relator, Mason, when he refused to grant an appeal from the judgment in attachment only, in the cause tried before him, the said Miller, and that, consequently, there was no error in the proceedings below.

The judgment is affirmed, at the costs of the relator of the appellant.

RUSH v. PEDIGO.

PRACTICE.—*Separation of Jury. Without Answering Interrogatories.*—*Venire de Novo.*—*New Trial.*—A jury to whom certain interrogatories had been submitted, to be answered in case they found a general verdict, was directed by the court, with the consent of the parties, that, if they agreed upon a verdict during the adjournment of court, they might seal it up and separate until the calling of court, whereupon the jury, having agreed upon a general verdict during adjournment, sealed it up and separated without answering the interrogatories. Upon the calling of court such verdict was returned by them into court, but, upon objection by a party to receiving said verdict, it was returned to the jury by the court, with instructions to retire and answer the interrogatories, to which such party objected and excepted. The jury, after consultation, returned into court the same general verdict, with answers to the interrogatories, which the court, over the objection and exception of such party, received and ordered to be filed, and discharged the jury.

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Held, that the action of the court was proper, and that such separation of the jury was not ground for either a *venire de novo* or a new trial.

Held, also, that, upon the second consultation of the jury, the whole case was before them, but that it was not error in the court to refuse to so instruct them.

From the Lawrence Circuit Court.

M. F. Dunn and *F. Wilson*, for appellant.

G. Putnam and *G. W. Friedley*, for appellee.

PERKINS, J.—Suit by Rush, against Pedigo, to recover damages for injury to the property of the former, occasioned by an alleged nuisance created by the latter, and to abate the same.

The alleged nuisance was created, it is averred in the complaint, by the raising of a mill-dam across Indian Creek, in Lawrence county, Indiana.

Issues of fact were formed, which were tried by a jury, and a verdict returned for the defendant.

Judgment, over a motion for a new trial, on the verdict.

Appeal to this court by the plaintiff, in which he assigns errors as follows :

1. The court erred in refusing plaintiff's motion for a *venire de novo* ;

2. The court erred in overruling the plaintiff's motion for a new trial.

We copy a bill of exceptions :

“ Be it remembered, that, after the evidence was given and the argument of counsel completed, the court charged the jury in writing, and submitted to them certain interrogatories in writing, and instructed them, in case they found a general verdict, they must then answer said interrogatories, being as follows :

- “ 1. What was the height of the dam at the beginning of this suit?

- “ 2. What was the height of the dam as put in by Ralph Lowder?

- “ 3. When was the original dam put in?

“ ‘ 4. For what period has the dam in dispute flowed the water back over plaintiff’s land ?

“ ‘ 5. If plaintiff’s ford across the stream has been deepened, was its depth increased by the dam, or was it produced directly by a freshet ?

“ ‘ 6. Was the dam, as originally maintained by Ralph Lowder, changed, and how and when ?”

“ Said jury then retired in charge of a room bailiff: and at the hour of adjournment of the court, said jury not having agreed upon a verdict, it was then agreed in open court, that, in case said jury agreed upon a verdict before the meeting of the court the next morning, they might seal the same up and separate and bring said verdict into court in the morning; that, at some hour in the night, and when the court was not in session, said jury agreed upon a general verdict, and, sealing the same up, was permitted to separate, and went each to his lodging place; that the next morning, when the court met, said jury being still separated, it was by order of the court called, and each juror answered and took his seat in the jury-box; and, being asked by the court if they had agreed upon a verdict, responded in the affirmative, and one of their number, viz., C. A. Trueblood, acting as foreman thereof, produced and handed to the clerk a sealed envelope, which, being opened by the clerk, was found to contain the following: ‘We, the jury, find for the defendant. C. A. Trueblood, foreman.’ Which was then and there read aloud by said clerk; that there was no other paper in said envelope; that, on being then and there asked by the court if they had answered the interrogatories submitted to them, the jury answered, they had not; whereupon said plaintiff objected to the court receiving said verdict, and the court directed the clerk to hand back said verdict to the jury, and directed the jury to retire to their room and answer said interrogatories, to which action of the court in send-

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ing said jury out again for that purpose the plaintiff at the time objected, because said jury had separated ; but the court overruled the objection, and the plaintiff at the time excepted.

“ The plaintiff then objected to sending said jury out to answer said interrogatories only, but asked that if said jury was allowed to retire, they should be allowed to take the whole case into consideration, and consider again their general verdict, as well as the answers to said interrogatories ; but the court overruled said plaintiff's objections, and refused to say to said jury to consider again the general verdict, as well as the answers to said interrogatories, or to say to said jury any thing on the subject, except to return to them said general verdict, with said interrogatories, and say to them the said special interrogatories would have to be answered by them ; to which ruling of the court the defendant at the time excepted.

“ Said jury then retired, and afterward returned into court, and, being asked if they had agreed upon a verdict, they, by their foreman, delivered to the clerk the same general verdict they had before returned, with answers to said interrogatories, as follows :

“ To the first interrogatory the answer was ‘ Six feet seven inches ; ’

“ To the second, ‘ Six feet seven inches ; ’

“ To the third, ‘ In 1836 ; ’

“ To the fourth, ‘ Since plaintiff owned the land ; ’

“ To the fifth, ‘ By a freshet ; ’ and,

“ To the sixth, ‘ It was not.’

“ And said plaintiff, before said verdict and answers were read, objected to receiving the same, for the reason that said jury had the evening previous, as shown, and before answering said special interrogatories, but after making said general verdict, separated before they returned said verdict the first time, but the court overruled said objection, and the plaintiff at the time excepted.

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“Said verdict and answers to interrogatories, and the interrogatories, were then read and filed.”

A motion for a *venire de novo* was overruled, and exception reserved.

A motion for a new trial was then made, and overruled.

The grounds of the motion for a new trial were:

1. Verdict contrary to law, and unsustained by evidence;

2. Misconduct of the jury who tried the cause, in this, to wit:

“That, after said jury had been charged, and retired to their room to consider of their verdict, they separated and went each to his lodging place, and remained so separated till court met next morning; and the court then, over plaintiff’s objection, sent said jury out to consider of their answers to interrogatories; and afterward, over plaintiff’s objection, received the verdict and answers to interrogatories, said jury having separated without the knowledge or consent of plaintiff.”

This second cause was verified.

3. Error in instructions to the jury.

The evidence is in the record by a bill of exceptions other than the one above copied.

No case was made for a *venire de novo*.

The jury empanelled to try the cause were not discharged till they had rendered a complete verdict, and fully answered the interrogatories propounded. It was lawful for the court to send them back to their room to perfect their work, and fully discharge the duty they were empanelled to perform. *Bradley v. Bradley*, 45 Ind. 67; *Reeves v. Plough*, 41 Ind. 204.

This case differs in its facts from *Trout v. West*, 29 Ind. 51. In that case, the jury were to return their verdict to the clerk, and separate finally. The clerk, and not the jury,

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was to deliver the verdict to the court in the morning. Here the jury were not to separate finally, on sealing their verdict, but to retain it and deliver it, as a jury, to the court, in the morning. See, also, *Sage v. Brown*, 34 Ind. 464; *Crocker v. Hoffman*, 48 Ind. 207.

We pass to the second assignment of error, viz., the overruling of the motion for a new trial.

There was no error in denying that motion. The grounds stated in the motion were insufficient. The verdict was not contrary to law, and was sustained by the evidence.

The instructions given were not excepted to.

The misconduct of the jury is not shown to have been such as to require the granting of a new trial. It was agreed by the parties that the jury might separate. The mere fact of their separation, therefore, can not be made a ground for a new trial. No instructions to the jury were required by the parties to be given. In *Crocker v. Hoffman*, 48 Ind. 207, it was said: "It was within the discretion of the court to permit the jury to separate. * * But in this case the separation took place with the consent and by the agreement of the parties. There was no error in this."

The statute requires an admonition to the jury on being permitted to separate after the cause is submitted to them. Section 330 of the code of practice.

But quoting again from *Crocker v. Hoffman*, *supra*: "The appellants, having consented that the jury might, after they had agreed upon, signed, sealed up, and delivered their verdict to the clerk, separate until morning without any admonition as mentioned in the above section, waived any objection thereto. Besides, it is not pretended that the jurors conversed among themselves, or that any other person addressed them during their separation, upon any subject of the trial. As the court has the discretion, without the consent of the parties, to permit the separation of the jury, and as the separation in the present case took place without any

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admonition, by the consent of appellants, and as it is not alleged that any injury resulted to the appellants, we think the court committed no error in overruling the motion for a new trial."

In this case the jury separated after they had found their verdict, but before they had answered the interrogatories.

The agreement of the parties, as stated in the bill of exceptions, was, that they might separate after they had agreed upon their verdict. They conformed in action to the letter of the agreement. Doubtless, the parties intended verdict and interrogatories, but they did not say so. We mention this fact as tending to show that the jury were misled by the failure of the parties to have the agreement fully stated, and that the act of the jury was not intentionally wrong. Indeed, the fact clearly appears, that the jury intended to act honestly and correctly in the premises; and there is no charge that they did not, or that the appellant was in any way injured by the irregularities complained of.

When the court returned to them their general verdict, and sent them back to their room to deliberate, the jury took with them, necessarily, the power and right to change their general verdict.

There was no material error on the part of the court, in refusing to say more than it did say to the jury, on returning them to their room.

Judgment affirmed, with costs.

CANADAY v. DETRICK ET AL.

ATTACHMENT.—*Garnishee.—Promissory Note.—Notice of Assignment.*—A judgment rendered against the maker of a promissory note, as garnishee in

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an attachment proceeding against the payee, is a good defence, to the extent of such judgment, to an action against the maker, by an assignee, upon such note, if, at the date of such judgment, the maker had no notice of the assignment.

SAME.—*Parties.*—*Interpleader.*—It is not necessary in such action to make the attachment creditor a party thereto.

From the Madison Circuit Court.

H. Cravens and *W. R. Pierse*, for appellant.

R. Lake, for appellees.

BIDDLE, J.—The record in this case is confused and irregular, but we believe it contains the merits of the controversy, which we endeavor to extract, as follows :

On the 18th day of February, 1871, Stephen R. Wiggins, Charles O. Wiggins and John D. Wiggins commenced attachment proceedings, before a justice of the peace, against Henry Coverston, and summoned Josiah Canaday, the appellant, as a garnishee, to answer as to his indebtedness to Coverston. Canaday appeared and was examined.

Upon the examination he admitted that he was indebted to Henry Coverston, on a promissory note to become due thereafter.

The justice adjudged that Canaday was so indebted to said Coverston upon said note, and ordered Canaday to pay the same for the benefit of the judgment creditors in the attachment suit against Coverston. In the mean time Coverston had endorsed the note against Canaday to Abraham Detrick, of which endorsement Canaday had no notice at the time the judgment in the garnishment was rendered against him. These facts we gather from the evidence, which is all before us in a bill of exceptions.

On the 5th day of February, 1872, Detrick commenced this suit in the court of common pleas, on the note made by Canaday to Coverston, and endorsed by him to Detrick.

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Canaday appeared to the complaint and answered, setting up the attachment proceedings, and the judgment therein against him as garnishee, and paid the amount into court, asking that the attachment creditors be required to interplead with Detrick and Coverston, and that the court adjudge to whom the money should be paid.

The court ordered that the judgment creditors be made defendants to the suit. Under this order they filed their answer. No reply was filed to either answer.

Upon this anomalous issue the court tried the case, found in favor of Detrick, and rendered judgment against Canaday, without any finding or judgment as to whom the money belonged, thus leaving Canaday with a judgment before the justice of the peace against him in favor of the attachment creditors, and a judgment against him in favor of Detrick in the court of common pleas, to all of which he excepted, and appealed from the judgment to this court.

These proceedings can not be sustained. It was unnecessary to make the attachment creditors defendants to Detrick's suit. This part of the proceedings, however, would have been harmless, if the court had not rendered judgment against Canaday. Canaday's answer was good, and was clearly proved, as shown by the evidence. A judgment against a garnishee in an attachment proceeding is a good defence to an action against him by the attachment defendant on the same cause of action, to the extent of the judgment in the garnishment. *Shetler v. Thomas*, 16 Ind. 223; *Schoppenhast v. Bollman*, 21 Ind. 280; *Barton v. Allbright*, 29 Ind. 489; *The Ohio and Mississippi R. W. Co. v. Alvey*, 43 Ind. 180; *Greenman v. Fox*, 54 Ind. 267.

The judgment is reversed, at the costs of the appellees; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings according to this opinion.

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ZEIGELMUELLER v. SEAMER.

PLEADING.—*Set-Off.—Tort.*—A claim arising out of a tort can not be pleaded as a set-off to an action on account.

SAME.—*Motion to set aside Default.*—A judgment rendered against a defendant by default, on his failure to appear, will not be set aside to allow proof of a set-off arising out of a tort, though the motion therefor allege a sufficient excuse for the failure to appear.

From the Marion Circuit Court.

R. B. Duncan, J. S. Duncan and Harvey & Galvin, for appellant.

M. G. McLain and J. P. Baker, for appellee.

Howk, C. J.—In this action the appellee sued the appellant, before a justice of the peace of Marion county, on an open account, for two dollars.

Before the justice, the appellant answered in two paragraphs :

1. Payment; and,
2. Set-off.

The trial before the justice resulted in a judgment in favor of the appellant and against the appellee, for the sum of thirty-six dollars and seventy-five cents, from which judgment the cause was appealed by the appellee to the circuit court.

In this latter court, though “three times loudly called,” the appellant came not, but herein made default.

A trial by the court, without a jury, resulted in a finding and judgment in favor of the appellee, and against the appellant, for the just and full sum of two dollars, the entire amount of his account.

This was on the 16th day of December, 1876.

Afterward, on the 20th day of December, 1876, the appellant came, and, upon his affidavit filed, moved the court “to set aside the default and judgment of dismissal, taken in this cause.” This motion was overruled by the court, and

to this ruling the appellant excepted, and filed his bill of exceptions, and appealed to this court.

The decision of the circuit court, in overruling his motion to set aside the default taken against him, has been assigned by the appellant as error.

In his affidavit in support of his motion, the appellant stated, in substance, that he had employed an attorney, naming him, upon whom he relied, "to attend the defence of said cause;" but that his said attorney, "from indisposition, was unable to attend to said cause, at the time it was called for trial, of which affiant was ignorant;" and further, that he had a "full and complete defence to the plaintiff's cause of action, which he will make manifest to the court, if the default and judgment were set aside and a new trial granted."

It may be assumed, we think, that the appellant's "full and complete defence" to the appellee's action was founded entirely upon the set-off filed by the appellant before the justice. For, in his affidavit to set aside the default, the appellant did not claim either that he did not owe, or that he had fully paid, the debt sued for in this action. The appellee's cause of action was an open account for goods sold and delivered by the appellee to the appellant. The cause of action was founded upon and arose out of contract.

The appellant's set-off was a claim arising out of tort, for trespass and the conversion of property. Such a claim can not be pleaded by way of set-off, against a cause of action founded upon or arising from contract, if it can in any case. *The Indianapolis, etc., Railroad Co. v. Ballard*, 22 Ind. 448; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Roback v. Powell*, 36 Ind. 515; *Harris v. Rivers*, 53 Ind. 216; and *Boil v. Simms*, 60 Ind. 162.

If, therefore, the appellant had shown sufficient cause, in other respects, for setting aside the default entered

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against him, in this action (a point which we need not and do not decide), yet, as he failed to show that he had any defence, of which he could lawfully avail himself, to the appellee's cause of action, we are bound to conclude that the court did not err in overruling the appellant's motion to set aside said default, or that the error was harmless, if any was committed. This court has often decided that it will not reverse a judgment for a harmless error. *Graeter v. Williams*, 45 Ind. 461; *The United States Express Co. v. Keefer*, 59 Ind. 263; and *Zorger v. The City of Greensburgh*, 60 Ind. 1.

The judgment is affirmed, at the appellant's costs.

THE INDIANAPOLIS, PERU AND CHICAGO R. W. Co. v.
BEAM ET AL.

JUSTICE OF THE PEACE.—*Appeal to Circuit Court.*—*Appeal Bond Executed Without Surety.*—*Mandate.*—A party, against whom a judgment had been rendered by a justice of the peace, tendered to the justice a bond executed by him without any surety, and demanded an appeal to the circuit court.

Held, in an action by such judgment defendant, against such justice and the judgment plaintiff, for a writ of mandate to compel the granting of such appeal, that such bond was insufficient.

From the Marshall Circuit Court.

D. Moss, for appellant.

W. B. Hess, for appellees.

NIBLACK, J.—The Indianapolis, Peru and Chicago Railway Company filed its complaint in the court below, verified by the affidavit of its agent, showing, amongst other things not necessary to be stated here, that one Richard Williams recovered a judgment against said railway com-

pany, for the sum of fifty dollars and costs, before Jacob Beam, a justice of the peace of Walnut township, in the county of Marshall; that, within thirty days after the rendition of such judgment, said railway company tendered to the said justice a good and sufficient appeal bond, in the penal sum of one hundred and twenty-five dollars, payable to the said Richard Williams, and executed by the said railway company by its proper officer and agent, and demanded an appeal from said judgment to the Marshall Circuit Court; that the said justice failed and refused to approve said appeal bond, and had also failed and refused to transmit to said circuit court a transcript of the proceedings before said justice, or any other papers in said cause; that said railway company was solvent, and was the owner of several thousand dollars worth of property in said county of Marshall, subject to execution.

Wherefore the said railway company prayed, that a mandate might issue to the said justice, requiring him to approve said appeal bond, and to transmit a transcript of the proceedings, together with the other papers in the cause, to the said circuit court.

Beam and Williams, both of whom were made defendants, demurred to the complaint, and the court sustained their demurrer, and refused to issue a mandate against said justice, as prayed for by the complaint.

The only question presented for our decision is, was the justice justified in refusing to approve the appeal bond tendered to him, signed as it was, only by the party demanding the appeal, granting that such party was amply able to respond to any damages that might be recovered upon such bond?

Section 65 of the act relating to justices' courts, which treats of appeals from such courts, enacts, that "The appellant shall, except in cases where the same is dispensed with by law, file with the justice a bond with security, to

The Board of Commissioners of Harrison County v. Leslie.

be approved by the justice, payable to the appellee, in a sum sufficient to secure the claim of the appellee, and interest and costs, conditioned that he will prosecute his appeal to effect, and pay the judgment that may be rendered against him in the * * circuit court." 2 R. S. 1876, p. 622.

The fair construction of this section of the statute evidently is, that, to entitle a party to an appeal from the judgment of a justice, he must file with such justice a bond, with the name of some other person besides, or other than, his own, signed to it as surety in such bond.

The case of *Murphy v. Steele*, 51 Ind. 81, cited by counsel for the appellant, does not conflict with this construction. On the contrary, it appears to us, by implication, to fully sustain it. In that case, the appeal from the justice had been dismissed in the court below, because the appeal bond had no name signed to it as surety, and it was plainly intimated by this court, that such appeal would have been properly dismissed, if the party appealing had not, in time, tendered a new bond, with sufficient surety.

With this construction of the section of the statute above quoted, we are necessarily required to hold, that the court below did not err in refusing a mandate against the appellee Beam upon the facts as set up in the appellant's complaint.

The judgment is affirmed, at the costs of the appellant.

THE BOARD OF COMMISSIONERS OF HARRISON COUNTY v. LESLIE.

COUNTY.—County Auditor.—Deputy or Employee.—Posting Notices of Sale.—School Fund Mortgage.—Fees and Salaries.—Principal and Agent.—In giving notice of a sale of real estate embraced in a school fund mortgage,

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as required by section 95 of the school law, 1 R. S. 1876, p. 801, while the fee and salary act of March 12th, 1875, was in force, it was the personal duty of the county auditor to post notices of such sale without other compensation than was provided for him in the latter act for managing the school fund of his county; and one who, under employment by the county auditor, performed such duty, could look only to the county auditor personally, and not to the county, for compensation.

From the Harrison Circuit Court.

W. A. Porter, for appellant.

L. Jordan and *H. Jordan*, for appellee.

Howk, C. J.—In this case, the appellee presented to and filed with the appellant, at its June term, 1876, an open account for allowance and payment, of which account the following is a copy :

“Board of Commissioners of Harrison county, Indiana,

“To Charles E. Leslie, Dr.

“1876, April. For posting notices of sale of advertised lands, forfeited to the school fund, of the following persons, to wit:

[We give only the initials of the persons named.]

“J. S. (2 mortgages).....\$5.00

“J. M..... 2.50

“J. M. W..... 2.50

“B. B..... 2.50

“\$12.50.”

The appellant rejected and refused to allow said account; and from this decision the appellee, Leslie, appealed to the circuit court.

The cause was tried by the court without a jury, and a finding was made for the appellee in the sum of ten dollars and fifty cents.

The appellant's motion for a new trial was overruled, and its exception was saved to this decision.

The court rendered judgment on its finding, from which judgment this appeal is now prosecuted.

The Board of Commissioners of Harrison County v. Leslie.

The appellant has assigned, in this court, the overruling of its motion for a new trial by the court below, as error. The causes assigned for such new trial were, that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law.

A bill of exceptions, containing the evidence on the trial, is properly in the record.

The testimony of the appellee, as a witness in his own behalf, was "all the evidence given in the cause." The appellee's testimony was as follows:

"I was employed by Cortez M. Miller, auditor of the county, to put up notices in different parts of the county, of the sales of lands forfeited to the school fund, as per my bill of particulars filed herein. I furnished my own horse, and was engaged three and one-half days in posting up said notices, and the services of myself and horse were worth three dollars per day."

It will be seen that the only question for decision, in this case, is this: Is the appellant liable to the appellee for the value of the services rendered by him, at the instance and under the employment of the auditor of Harrison county? We are clearly of the opinion that this question must be answered in the negative. The statute, known as the common school law of March 6th, 1865, makes it the duty of the county auditor to manage the school fund of his county, to make loans thereof on mortgage security, and, if default is made in the payment of either interest or principal, to collect the same by suit or by sale of the mortgaged premises. 1 R. S. 1876, p. 778, *et seq.* If the auditor shall elect to collect the loan and interest by sale, it is provided in section 95 of the common school law as follows:

"Before sale of mortgaged premises, the auditor shall advertise the same in some newspaper printed in the county where the land lies, if any there be, otherwise in a paper

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in the State nearest thereto, for three weeks successively, and also by notice set up at the court-house door, and in three public places in the township where the land lies." 1 R. S. 1876, p. 801.

This section makes it the personal duty of the county auditor to post the notices of his sales, in his management of the school fund of his county. Of course, he could procure this posting to be done by some one for him; but, in that event, whoever did it, would act for him and under his employment, and not under the employment of his county.

In the last sentence of section 12 of the fee and salary act of March 12th, 1875, it is provided, that "Auditors shall receive one per cent. for managing the school fund of the county, and no other fee or compensation therefor." 1 R. S. 1876, p. 471.

In the management of the school fund of his county, it became and was the personal duty of the auditor of Harrison county to post the notices mentioned in the appellee's account sued on in this action. If the auditor had posted those notices, in his own proper person, it is very certain that he would not have any valid claim against his county for such services; and, as the appellee was merely the agent or servant of the auditor, and acting for him, in posting the notices, the appellee could not, it seems to us, acquire or assert any valid claim against the appellant for the value of his services.

In section 15 of the fee and salary act above referred to, it is provided, that "The board of county commissioners shall make no allowance, not specially required by this act, to any county auditor, * * * either directly or indirectly, nor to any clerk, deputy, bailiff or employee of such officer," etc. 1 R. S. 1876, p. 472.

On the face of his claim, in this case, the appellee asked an allowance for services rendered by him, as an employee

Miller v. Muir, Administrator.

of the county auditor. The appellant was expressly prohibited, in and by said section 15, from allowing the appellee's claim. If the appellant had no right to allow such claim, it is clear that the circuit court had no such right, on appeal from the board of commissioners. *Hanlon v. The Board, etc., of Floyd County*, 53 Ind. 123; and *The Board, etc., of Greene County v. Stropes*, 58 Ind. 54.

We think that the finding of the court below, in this case, was contrary to the law, and for this reason we hold that the court erred in overruling the appellant's motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to sustain the appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

MILLER v. MUIR, ADMINISTRATOR.

BILL OF EXCEPTIONS.—*Time of Filing.*—Where, on the 10th of June, sixty days are given within which to file a bill of exceptions, the 12th of August succeeding is too late to file the same.

From the Dearborn Circuit Court.

N. S. Givan, for appellant.

F. Adkinson and *G. M. Roberts*, for appellee.

BIDDLE, J.—Motion for an execution.

At the July term of the Dearborn Circuit Court, 1865, the appellee, as administrator of the estate of James Muir, Sr., deceased, recovered judgment against the appellant for the sum of fourteen hundred and eighty-nine dollars and seven cents. No execution was ever issued to collect the judgment.

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On the — day of October, 1875, the appellee filed his motion to revive the judgment, and to have execution thereof.

The appellant answered the motion by a general denial, but by an agreement between the parties all matters of defence were to be given under the answer.

Trial by the court ; finding for the appellee.

Motion for a new trial overruled ; exceptions.

Final judgment was rendered on the finding on the 10th day of June, 1876, and the appellant had from that date sixty days within which to file a bill of exceptions, but the bill was not filed until the 12th day of August, 1876. This is too late. No questions are made in the case, except such as arise upon the bill of exceptions, and that, not having been filed in time, can not be considered as in the record. There is therefore no question before us for our consideration. It would be far more satisfactory to us to decide the case on its merits, but the appellee insists upon the defect in the record, and we can not deny him his right.

The judgment is affirmed, at the costs of the appellant.

63	497
129	200
63	497
131	93
63	497
151	244
63	497
188	886

THE STATE, EX REL. GODFROY, v. THE BOARD OF COMMISSIONERS OF MIAMI COUNTY.

TAXES.—*Lands Held by Indians.*—*Mandate to Refund Illegal Taxes.*—*County Commissioners.*—*Complaint.*—In an action by the State, on the relation of one claiming to be an Indian of a certain tribe holding lands reserved to them in this State pursuant to a treaty with the United States, to compel a board of county commissioners by mandate, to refund certain alleged

The State, ex rel. Godfroy, v. The Board of Commissioners of Miami County.

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illegal taxes assessed against such lands and collected from such Indians, the complaint failed to allege that such lands were reserved to such Indians as a tribe or band, and not individually.

Held, on demurrer, that the complaint is insufficient.

Held, also, that, by section 10 of the act of December 21st, 1872, in relation to the assessment of taxes, 1 R. S. 1876, p. 72, lands in this State, reserved to or for any individual under any treaty between an Indian tribe and the United States, are taxable from the date of confirmation of such treaty.

SAME.—Application to Commissioners to Refund.—Appeal.—Mandate.—Remedy.—Where an application has been made to and refused by a board of commissioners under the provisions of the act of March 2d, 1853, 1 G. & H. 110, for the refunding of taxes illegally assessed and collected, the remedy of the applicant is by appeal thence to the circuit court and not by mandate.

SAME.—Judicial Act.—Ministerial Act.—The action of a board of commissioners upon such an application is a judicial, and not a ministerial, act.

From the Miami Circuit Court.

H. J. Shirk, J. Brownlee and H. Brownlee, for appellant.
N. O. Ross and J. Mitchell, for appellee.

NIBLACK, J.—This was a proceeding instituted in the court below, in the name of the State, on the relation of Gabriel Godfroy, alias Top-Pier-Yah, against the Board of Commissioners of the county of Miami, to compel them to refund certain taxes alleged to have been improperly collected from the relator.

The complaint, which was verified by affidavit, may, after some immaterial changes in its phraseology merely, be stated as follows:

“Gabriel Godfroy, for himself and others, whose names are too numerous to be named as relators, but whose grievances are in all things similar to the claim of said Godfroy, complains of the Board of Commissioners of the county of Miami, and informs the court, that the said Godfroy is a Miami Indian, and a member of that part of said tribe designated by the treaty of 1854, made between the United States and the Miami Indians, as the Miamis of Indiana.

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“Said relator also informs the court, that he is the son of Francis Godfroy, one of the chiefs of said Miami nation; that he, said relator, has always resided on the lands reserved to him and his ancestors, members of said tribe, which have never been owned by any citizen of the United States.

“Said relator avers, that he and the others, for whom he also sues, are of the Miami tribe and nation of Indians named and specified in the several treaties made between the United States and the Miami Indians, and in the acts of Congress passed in relation to said Miami Indians. Said relator, for himself and said others he represents, claims that they have never been citizens of the State of Indiana, nor of the United States, but that said Indians named and referred to in said treaty of 1854, (of which said relator and said others are a part,) were, before and since said treaty of 1854, part of a dependent tribe residing in the State of Indiana, and are not governed by, nor subject to, the laws of the State of Indiana, only so far as the public safety requires.

“Said relator charges, that he and said others, on whose behalf he sues, have been the owners of personal and real property, the said real property being the real estate so reserved to them and their ancestors, as aforesaid, on and for which they have been charged, and have been required by the treasurer of said county of Miami to pay, a large amount of taxes, both State and county, to wit, by said Godfroy, State taxes one thousand one hundred dollars; county taxes twenty-five hundred dollars, which includes all taxes except State, school and sinking-fund taxes.

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The State, *ex rel.* Godfroy, *v.* The Board of Commissioners of Miami County.

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Held, on demurrer, that the complaint is insufficient.

Held, also, that, by section 10 of the act of December 21st, 1872, in relation to the assessment of taxes, 1 R. S. 1876, p. 72, lands in this State, reserved to or for any individual under any treaty between an Indian tribe and the United States, are taxable from the date of confirmation of such treaty.

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“Said relator also informs the court, that he is the son of Francis Godfroy, one of the chiefs of said Miami nation; that he, said relator, has always resided on the lands reserved to him and his ancestors, members of said tribe, which have never been owned by any citizen of the United States.

“Said relator avers, that he and the others, for whom he also sues, are of the Miami tribe and nation of Indians named and specified in the several treaties made between the United States and the Miami Indians, and in the acts of Congress passed in relation to said Miami Indians. Said relator, for himself and said others he represents, claims that they have never been citizens of the State of Indiana, nor of the United States, but that said Indians named and referred to in said treaty of 1854, (of which said relator and said others are a part,) were, before and since said treaty of 1854, part of a dependent tribe residing in the State of Indiana, and are not governed by, nor subject to, the laws of the State of Indiana, only so far as the public safety requires.

“Said relator charges, that he and said others, on whose behalf he sues, have been the owners of personal and real property, the said real property being the real estate so reserved to them and their ancestors, as aforesaid, on and for which they have been charged, and have been required by the treasurer of said county of Miami to pay, a large amount of taxes, both State and county, to wit, by said Godfroy, State taxes one thousand one hundred dollars; county taxes twenty-five hundred dollars, which includes all taxes except State, school and sinking-fund taxes.

“Said relator further informs the court that his and said other property was listed for taxation, charged on the proper duplicate and collected by said treasurer from him and those others for whom he also appears, as if they had been citizens of said State, and as if they and their prop-

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erty had been liable to be charged with taxes, which taxes were so charged and collected for the year 1874, and preceding years.

“Said relator further charges that he appeared before said board of commissioners, when in session, and offered to show and prove the facts and matters herein above stated, and to have said taxes so wrongfully collected refunded, so far as the same have been paid into the county treasury of said county, and to have said board of commissioners certify to the auditor of said State of Indiana said state taxes which had been paid into the state treasury.

“Said relator further charges that said board of commissioners refused to so refund to him said county taxes, and refused to certify to said auditor of state said state taxes, and still refuse. Wherefore said Godfroy asks that a mandate be issued to and against said board of commissioners requiring them to so refund and certify said taxes and other proper relief.”

The defendant demurred to the complaint for want of sufficient facts, and the court sustained the demurrer.

The plaintiff declining to plead further, there was judgment upon demurrer, in favor of the defendant and against the relator, for costs.

The question of the sufficiency of the complaint is therefore the only question we are required to decide.

It is not averred in the complaint, that the lands on which the relator was compelled to pay, and did pay, taxes, were reserved to, or held by, the Miami Indians as a tribe, or by any subdivision of such Indians as a band. This case does not, therefore, come within the rule as to the non-taxability of the lands of certain Miami Indians, laid down in *Me-shing-go-me-sia v. The State*, 36 Ind. 310.

In the act of December 21st, 1872, 1 R. S. 1876, p. 72, sec. 10, it is provided, that “All lands reserved to or for

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any individual, by any treaty between the United States and any Indian tribe or nation, shall be liable to taxation from the time such treaty shall have been confirmed."

Our attention has not been called to any provision in any of the treaties between the United States and the Miami Indians, which is in conflict with the section of the statute above quoted. We will therefore assume, that the section thus quoted is of valid and binding authority upon the Miami Indians, as well as the white people, of the State. Acting upon that assumption, and upon the theory that, in this case, it devolved upon the relator to show affirmatively, that the lands so reserved to him and his ancestors were not subject to taxation, we think there ought to have been some averment in the complaint making it appear that such land did not fall within the class of reserved lands covered by the section above set out. There is, however, no such averment. On the contrary, the inference from what is alleged is rather that the relator's lands were reserved to him and his ancestors individually, and not collectively with others.

Again, the act of March 2d, 1853, providing for the refunding of taxes wrongfully assessed and collected, 1 G. & H. 110, which we hold to be still in force, except as modified by the act of February 8th, 1877, as regards certain school lands, Acts 1877, Reg. Sess., p. 139, although not contained in Davis' revision of the statutes, of 1876, enacts, in effect, that an appeal lies in cases where county commissioners refuse to hear applications of persons to have taxes wrongfully collected refunded to them, as in other cases of appeals from the decisions of such commissioners.

Upon the allegations of the complaint as to the refusal of the defendant to hear the application of the relator to have the taxes complained of refunded, we are of the opinion that the relator's proper remedy was by an appeal

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to the circuit court, and not by application to that court for a mandate against the commissioners.

The hearing of the proofs and determination of the right of a party to have taxes paid by him refunded is a judicial rather than a ministerial act, and hence not a proper subject to be controlled by a mandate from a superior court. See *The State, ex rel. Reynolds, v. The Board of Commissioners of Tippecanoe County*, 45 Ind. 501, which is, in many respects, a parallel case to the one in hearing. High's Extraordinary Legal Remedies, sec. 617.

We do not deem it necessary to pass upon some other questions discussed by counsel, as the insufficiency of the complaint, for the reasons already given, requires us to affirm the judgment below.

The judgment is affirmed, at the costs of the relator of the appellant.

Petition for a rehearing overruled.

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CRIMINAL LAW.—Perjury.—Indictment.—Juror.—An indictment for perjury may be predicated upon alleged false answers given by the defendant while being examined under oath as to his competency to sit as a juror on the trial of a cause. See opinion for form of indictment.

From the Boone Circuit Court.

T. W. Woollen, Attorney General, and *H. C. Wills*, Prosecuting Attorney, for the State.

Howk, C. J.—At the February term, 1877, of the Boone Circuit Court, the appellee was indicted by the grand jury of said court and term, upon a charge of perjury.

The appellee appeared at the same term, in person and by counsel, and moved the court to quash the indictment,

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which motion was sustained by the court, and to this decision the State, by its attorney, excepted.

The court rendered judgment discharging the appellee from custody.

The State, by its attorney, has appealed to this court, and has here assigned, as error, the decision of the circuit court in quashing the indictment. This error presents for our consideration and decision the single question of the sufficiency of the indictment.

As necessary to a proper understanding of the question presented, and of our decision thereof, we set out the body of the indictment, as follows:

“The grand jurors for the county of Boone and State of Indiana, duly and legally empanelled, charged and sworn in open court, at the February term of the Boone Circuit Court of said State, for the year A. D. 1877, to inquire into felonies and certain misdemeanors, within and for the body of said county of Boone and State of Indiana, upon their oath do present, that heretofore, to wit, at the November term of the Boone Circuit Court, in and for said county of Boone and State of Indiana, in the year A. D. 1876, on the 6th day of December, A. D. 1876, at the said county of Boone and State aforesaid, before the Hon. Clarkson N. Pollard, Judge of the Thirty-sixth Judicial Circuit of the State of Indiana, and the then acting Judge of the Boone Circuit Court by appointment from the Hon. Truman H. Palmer, the *ex officio* judge of the Boone Circuit Court, a certain issue between the State of Indiana and Eusabeus Altum and Philip Altum, in a certain suit on an indictment for grand larceny, wherein the said State of Indiana was plaintiff and the said Eusabeus Altum and Philip Altum were defendants, came on to be tried in the Boone Circuit Court, in Boone county, Indiana, in due form of law, the said court then and there having competent authority in that behalf; that, for the purpose of try-

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ing the issue so joined in said suit as aforesaid, upon said indictment charging the said Eusabeus Altum and Philip Altum with the crime of grand larceny, a jury consisting of George W. Shelburn, Green McDaniel, Jacob Johns, Richard Lumpkins, Cornelius H. Laue, Thomas M. Small, David McIlvane, William H. Williamson, Addison L. Howard, W. S. Smith, Joseph Shanter and Francis Colgrove, twelve lawful men, freeholders or householders of Boone county, Indiana, were called and sworn and took their corporal oath before the said court, which oath was then administered to the said jurors aforesaid by one Levi Lane, who was the regularly appointed, qualified and acting deputy-clerk of the said Boone Circuit Court, the said court and the said Levi Lane then and there having competent authority in that behalf, that they would true answers give to such questions as were asked them, touching their competency to act as jurors in said cause so pending; that, at and upon the examination of the said jurors aforesaid, touching their competency to serve as jurors on the trial of said cause aforesaid, it then and there became and was a material question whether one Addison L. Howard, one of said jurors called and sworn as aforesaid, had formed or expressed an opinion as to the guilt or innocence of the said Eusabeus Altum and Philip Altum of said crime of grand larceny, defendants in said suit as aforesaid, who were then and there about to be placed upon trial on said indictment then and there and therein charging and presenting them with the crime of grand larceny as aforesaid, and the said Addison L. Howard, one of said jurors aforesaid, then and there, on the examination of said jurors aforesaid, touching their competency to serve as jurors on the trial of said cause as aforesaid, upon his oath aforesaid, feloniously, wilfully, corruptly and falsely, before the court aforesaid, did depose and swear in substance and to

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the effect following, that is to say, that he, the said Addison L. Howard, had not *formed* or *expressed* an opinion as to the guilt or innocence of the said Eusabeus Altum and Philip Altum of said crime of grand larceny, of which they then stood charged, and on which charge they were then about to be placed on trial; whereas, in truth and in fact, the said Addison L. Howard, one of said jurors as aforesaid, had, previous to the time of his being called and sworn as a juror in said cause as aforesaid, and in the presence of and to John Isenhour, Irenius Isenhour, S. I. Gillam and divers other persons whose names to the grand jurors are unknown and can not be given, expressed an opinion as to the guilt or innocence of the said Eusabeus Altum and Philip Altum of said crime of grand larceny as aforesaid, by then and there stating to and in the presence of said John Isenhour, Irenius Isenhour, S. I. Gillam and said divers other persons whose names are unknown and can not be given, that he, the said Addison L. Howard, did not believe and never did believe, that the said Eusabeus Altum and Philip Altum were guilty of said crime of grand larceny, of which they stood charged, and for which said offence they were then about to be placed on trial; whereas, in truth and in fact, the said Addison L. Howard had, previous to the time of his being called and sworn as a juror in said cause as aforesaid, formed an opinion as to the guilt or innocence of the said Philip Altum and Eusabeus Altum of said crime and charge of grand larceny, with which they stood charged and for which said offence they were then about to be placed on trial; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Addison L. Howard, on the 6th day of December, 1876, at said county of Boone and State of Indiana, and before the Boone Circuit Court aforesaid, did, in manner and form aforesaid, feloniously, wilfully, corruptly and falsely commit wilful and corrupt perjury, contrary to the

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form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana."

We have no brief or argument of this cause from the appellee, in this court; and therefore our only information in regard to the grounds of the decision of the circuit court, in quashing the indictment, is derived from the brief of the appellant's counsel. We learn therefrom, that the indictment was quashed because its allegations "were not sufficient to show that the defendant, Howard, had expressed an opinion." If this was the ground on which the court quashed the indictment, it is very clear, we think, that the decision was erroneous, and can not be sustained. For, it was fully, clearly and explicitly alleged in the indictment, that the appellee had expressed the opinion to, and in the presence of, divers persons, some of whom were named, and others whose names were unknown, that he "did not believe, and never did believe, that the said Eusabeus Altum and Philip Altum were guilty of said crime of grand larceny, of which they stood charged," etc.

If this was not an expression of an opinion, we can not understand what would be such an expression.

In section 101 of the criminal code of this State, it is provided, that "The court may quash an indictment, on motion, when it appears upon its face, either—

"*First.* That the grand jury had no legal authority to inquire into the offence charged;

"*Second.* That the facts stated do not constitute a public offence;

"*Third.* That the indictment contains any matter which, if true, would constitute a legal justification of the offence charged, or other legal bar to the prosecution." 2 R. S. 1876, p. 399.

In the case at bar, the offence charged in the indictment was committed, if committed at all, in Boone county, and therefore the grand jury of that county had "legal au-

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thority " to enquire into said offence; the facts stated in the indictment clearly constituted a public offence, and it can not be said, that the indictment contained any matter "which, if true, would constitute a legal justification of the offence charged, or other legal bar to the prosecution." It follows, therefore, that, under the statute cited, the court was not authorized to quash the indictment.

In section 61 of the criminal code, it is expressly provided, that no indictment or information shall be quashed or set aside for any "defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." 2 R. S. 1876, p. 386.

After a careful and thorough examination of the indictment in this cause, we are satisfied that there is no defect or imperfection therein, which would "tend to the prejudice of the substantial rights of the defendant upon the merits." Indeed, it seems to us, that the indictment in this case is remarkably free from defects or imperfections, technical or otherwise, and that it will constitute a good precedent for drafting indictments, in similar cases.

For the reasons given, we think that the circuit court erred, in the cause now before us, in sustaining the appellee's motion to quash the indictment.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule the appellee's motion to quash the indictment, and for arraignment and further proceedings thereon.

MCCARTHY v. FROELKE.

TOWNSHIP TRUSTEE.—Eligibility.—Alien.—A voter under the constitution of this State, though not a citizen of the United States, is eligible to the office of township trustee.

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From the Knox Circuit Court.

O. F. Baker, H. S. Cauthorn, J. M. Boyle, C. M. Allen and C. G. McCord, for appellant.

W. F. Pidgeon, F. W. Viehe, R. G. Evans, G. G. Reily, W. C. Johnson and W. C. Niblack, for appellee.

BIDDLE, J.—The appellant, the contestor below, a citizen and voter of Knox county, filed his cause of contest, in writing, in the office of the county auditor, against the appellee, the contestee below, to contest his election to the office of township trustee of Vincennes township, of said county.

A trial was had before the Board of Commissioners of the county of Knox, resulting in a judgment against the contestee.

He appealed to the circuit court, and demurred to the cause of action because, as he alleged, it does not state facts sufficient to maintain the contest. His demurrer was sustained, and judgment rendered against the contestor, who excepted and appealed to this court.

The facts averred, upon which the contest is based, not being in dispute, may be condensed as follows:

That the contestor is a qualified elector of Vincennes township, and entitled to vote at all legal elections held by virtue of the laws of this State; that the contestee, at a general election held in said township, on Tuesday, the 10th day of October, 1876, received for the office of township trustee nine hundred and eighty-one votes; that John M. Duesterberg received, at the same election, for the same office, eight hundred and thirty-two votes; that the contestee was declared duly elected; that no other person was voted for at said election for said office; that the appellant contests the right of the contestee to hold said office because he was, at the time of the election, ineligible to be voted for or hold said office; that said contestee was born

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in Prussia, and owed allegiance thereto by birth; that he emigrated therefrom, and arrived in the United States on the 9th day of September, 1849; that, on the 29th day of September, 1852, before the clerk of the Knox Circuit Court, he duly declared his intention to become a citizen of the United States, according to the laws of Congress, but has never taken the oath of renunciation from Prussia, nor the oath of allegiance to the United States; and that said John M. Duesterberg received the highest number of votes at said election of any person eligible to be voted for and hold said office, and was therefore duly elected.

These facts show that the contestee was not a citizen of the United States, but that he was, at the time of the election, a voter, under the constitution of the State of Indiana, entitled to vote in the township or precinct where he resided, at all general elections held within the State. Art. 2, sec. 2. The question before us, therefore, is simply this: Is a voter under the constitution of the State of Indiana, though not a citizen of the United States, eligible to hold the office of township trustee?

By the constitution of this State, "No person shall be eligible to the office of governor or lieutenant governor, who shall not have been five years a citizen of the United States, and also a resident of the State of Indiana during the five years next preceding his election." Art. 5, sec. 7. It also provides, that "No person shall be a senator or a representative, who, at the time of his election, is not a citizen of the United States; nor any one who has not been, for two years next preceding his election, an inhabitant of this State, and, for one year next preceding his election, an inhabitant of the county or district whence he may be chosen." Art. 4, sec. 7. The constitution also provides, that "There shall be elected in each county, by the voters thereof, at the time of holding general elections, a clerk of the circuit court, auditor, recorder, treasurer, sheriff, coroner, and sur-

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veyor;” and that “Such other county and township officers as may be necessary, shall be elected or appointed in such manner as may be prescribed by law.” It further declares, that “No person shall be elected or appointed as a county officer who shall not be an elector of the county.” Art. 6, secs. 2, 3 and 4.

After declaring that no person shall be eligible to the office of governor, lieutenant governor, senator or representative, except a citizen of the United States, and then declaring that no person shall be elected or appointed as a county officer who shall not be an elector of the county, the construction plainly arises that any elector of a county is eligible to any county office. If the framers of the constitution had intended to require the same degree of eligibility for a county office that they declared necessary for the office of governor, lieutenant governor, senator and representative, they would doubtless have so declared in plain terms. Under these provisions of the constitution, if we hold that a citizen of the United States, having the other necessary qualifications, is eligible to the office of governor, lieutenant governor, senator or representative, we must hold that an elector of a county, having the other necessary qualifications, is eligible to a county office, although he may not be a citizen of the United States. We can find no provision, either in the constitution or the statutes, prescribing the eligibility necessary to hold the office of township trustee; we must, therefore, look to other provisions, and their fair interpretations, to settle the question before us. Under the constitution it is clear that the contestee was eligible to any county office, and we think it would be illogical to hold that a township office, which is of lesser magnitude, should require a higher degree of eligibility than a county office. The constitution, and its fair interpretation, therefore, conduct us to the conclusion that the contestee was eligible to the office of

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township trustee, and that he is entitled to hold it, and exercise its functions.

As this question must be decided by the constitution of Indiana, there being no statute prescribing the eligibility of township officers, and as so few of the constitutions of our sister states contain similar provisions to our own relative to citizenship and the right of suffrage, we are unable to find many precedents, or much light from other sources, upon the question, to guide us in our researches. Whatever the constitution of a state fixes as the status of her citizens, in reference to the right of suffrage or the eligibility to hold office, must control, irrespective of common or political law. Cushing's Law & Practice of Legislative Assemblies, sec. 24.

The only case we can find in our own reports, touching the constitutional eligibility to hold office, is that of *Carson v. McPhetridge*, 15 Ind. 327, but the question now before us is not there presented.

The constitution of the State of Wisconsin contains provisions upon the subjects of right of suffrage and eligibility of aliens to hold office, similar to those contained in the constitution of this State. In that State it has been held that a resident alien, who has declared his intention to become a citizen of the United States, pursuant to the naturalization laws of Congress, becomes thereby a citizen of the State of Wisconsin. *In re Carl Wehlitz*, 16 Wis. 468; *State, ex rel. Off, v. Smith*, 14 Wis. 497; *In re Conway*, 17 Wis. 543.

The citizenship of a resident, under the constitution of the United States and the constitution of the state wherein he resides, is much discussed in the celebrated case of *Dred Scott v. Sandford*, 19 How. 393. See also the case of *Searcy v. Grow*, 15 Cal. 117.

We are of the opinion that there is no error in the record.

Patton *et al.* v. Camplin.

The judgment is affirmed, at the costs of the appellant.
This judgment is rendered as of the November term,
1877.

PATTON ET AL. v. CAMPLIN.

CONVEYANCE.—*Breach of Covenant.*—*Counter-Claim.*—*Copy.*—*Exhibit.*—A counter-claim, based upon an alleged breach of the covenants of a deed of conveyance of lands executed by the plaintiff to the defendant, must, to be sufficient on demurrer, set out either the original deed or a copy thereof.
PRACTICE.—*Affidavit to Set Aside Judgment.*—*Bill of Exceptions.*—*Record.*—*Supreme Court.*—An affidavit, supporting a motion to set aside a judgment, forms no part of the record on appeal to the Supreme Court, unless embodied in a bill of exceptions.

From the White Circuit Court.

— *Carnahan* and *R. Gregory*, for appellants.

WORDEN, J.—Suit by the appellee, against the appellants, upon a promissory note executed by the defendants to the plaintiff.

Judgment for the plaintiff.

The defendants answered, setting up, in substance, that the note sued on was given for the purchase-money, in part, for certain real estate purchased from the plaintiff and one James Hays; that the plaintiff and James Hays executed to the defendants a warranty deed for the real estate; that, at the time of the execution of the deed, the grantors had no title to one-fourth of the real estate, but that the same was in the heirs of Solomon Hays; that the full consideration for the real estate was two thousand one hundred dollars, all of which has been paid except the note in suit.

A demurrer to this paragraph of answer, for want of sufficient facts, was sustained, and of this ruling the appellants complain.

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It is plain, that, if the answer alleged any matter of defence or counter-claim, it was based upon the covenants in the deed. The deed, therefore, was the foundation of the defence, and the original, or a copy thereof, should have been filed with the answer. This was not done, and the demurrer, therefore, if for no other reason, was correctly sustained.

The defendants filed an affidavit, on which they asked the court to set aside the judgment, but this motion was overruled. The affidavit was not made a part of the record by bill of exceptions or otherwise; hence we can not notice it.

There is no error in the record.

The judgment below is affirmed, with costs.

CRAIG ET UX. v. DONOVAN.

COVENANT.—Seizin.—Husband and Wife.—Deed Executed in this, for Land in another, State.—Complaint.—Demurrer.—In an action for damages for a breach of the covenants of warranty contained in a deed of conveyance of lands in another State, purporting on its face to have been executed in this State, for a valuable consideration, by the defendants as husband and wife, to the plaintiff, the complaint set out a copy of the deed and alleged that it had been executed in this State, between residents thereof, upon a valuable consideration, but that the defendants had never had either title to or possession of such lands.

Held, that, on joint demurrer, the complaint is sufficient, though insufficient on separate demurrer by the wife.

Held, also, that the covenant of seizin in the deed was purely personal, did not run with the land, and was broken immediately upon the execution of the deed.

From the Montgomery Circuit Court.

G. W. Paul, G. C. Coon and J. McCabe, for appellants.

P. S. Kennedy, W. T. Brush and R. B. F. Peirce, for appellee.

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Howk, C. J.—In this action, the appellee, as plaintiff, sued the appellants, as defendants, in a complaint of two paragraphs.

Subsequently, the appellee filed a third paragraph of his complaint, and withdrew or dismissed the first two paragraphs originally filed.

The appellants jointly demurred to the third paragraph of the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the court, and to this decision they excepted.

The appellants jointly answered, by general denial.

The issues joined were tried by the court without a jury, and a finding was made for the appellee, in the sum of one thousand and eight dollars, and judgment was rendered accordingly.

The appellants' motion for a new trial was overruled, and to this ruling they excepted, and appealed to this court.

The appellants have here assigned, as errors, the following decisions of the circuit court:

1. In overruling their demurrer to the third and only paragraph of appellee's complaint; and,
2. In overruling their motion for a new trial.

We will consider and decide the questions presented by the appellants' counsel, arising under these alleged errors, in the order of their assignment.

1. In the third and only paragraph of his complaint, the appellee alleged, in substance, that the appellants, on the 8th day of April, 1875, by their deed executed on that day in Montgomery county, Indiana, all the parties thereto being citizens and residents of said county and State at said date, which said deed was filed with and made part of said paragraph, conveyed and warranted to the appellee the following described land, in Taney county, Missouri,

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to wit: The south-east quarter of section 6, in township 23, range 17 west, containing 160 acres, for which said conveyance the appellee paid the appellants the sum of two thousand dollars; that the appellants, by the terms of said deed, warranted that they were seized of said land and had good right to convey the same; whereas, in fact and in truth, they nor either of them had any title whatever to said land, and never had possession thereof, the same having been all the time, from before the date of said conveyance, in the lawful possession of the United States, and at the time of said conveyance the title to said land was in the United States; wherefore the appellee said there was a breach of the covenants in said deed, whereby he had been damaged in the sum of two thousand five hundred dollars, for which sum he demanded judgment.

The deed which was the foundation of the appellee's action, and was made part of his complaint, was in the words and figures following, to wit:

"This indenture witnesseth, that Thomas F. Craig and Mary E. Craig, his wife, of Montgomery county, in the State of Indiana, convey and warrant to Michael Donovan, of Montgomery county, in the State of Indiana, for the sum of two thousand dollars, the following real estate in Taney county, in the State of Missouri, to wit: The south-east quarter of section six (6), township twenty-three (23), range seventeen (17), containing one hundred and sixty (160) acres, more or less. In witness whereof the said Thomas F. Craig and Mary E. Craig, his wife, have hereunto set their hands and seals, this 8th day of April, 1875.

(Signed,)

"THOS. F. CRAIG, [SEAL.]

"MARY E. CRAIG." [SEAL.]

This deed appeared to have been acknowledged, on the day of its date, by Thomas F. Craig and Mary E. Craig,

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his wife, before a notary public of Montgomery county, Indiana.

It is very certain, we think, that the complaint did not state a good cause of action against the appellant Mary E. Craig; for it appears from the deed, which was made part of the complaint, that she was a married woman, the wife of her co-appellant, when the deed was executed, and therefore she was not bound by any of the covenants contained in the deed. If she had demurred separately to the complaint, for the want of sufficient facts therein, it would have been error to overrule her demurrer; but, as she demurred to the complaint jointly with her co-appellant, if it stated facts sufficient to constitute a cause of action against her co-appellant, then the demurrer was correctly overruled as to both the appellants. *Trisler v. Trisler*, 38 Ind. 282; *Shore v. Taylor*, 46 Ind. 345; and *Wilkerson v. Rust*, 57 Ind. 172.

It will be seen from the deed above set out, that it conforms substantially to the form given for a warranty deed in section 12 of "An act concerning real property and the alienation thereof," approved May 6th, 1852. 1 R. S. 1876, p. 364.

In that section, it is provided, that such deed "shall be deemed and held to be a conveyance in fee-simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives, that he is lawfully seized of the premises, has good right to convey them," etc.

The averments of the complaint show, that the deed in question was executed in this State, by and to resident citizens of this State.

The action was brought to recover damages for an alleged breach of the covenant of seizin contained in that deed, "purely a personal covenant," which does not run with the land.

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It was alleged in the complaint, that the appellants had not, nor had either of them, any title whatever to the land conveyed, and never had possession thereof, but that the title thereto, at the time of said conveyance, was in the United States. If these allegations were true, and the appellants' demurrer admits their truth, then it is clear, we think, that the appellants' covenant of seizin was broken immediately after it was executed, and a cause of action for the damages occasioned by such breach accrued at once to the appellee. *Bottorf v. Smith*, 7 Ind. 673, and *Bethell v. Bethell*, 54 Ind. 428.

The doctrine of the case last cited, it seems to us, is decisive of the case now before us. It was said in the case cited, and may well be said in this case: "As the deed was executed in Indiana, and as the parties resided therein, it would seem that they accepted the law of Indiana as the exponent of the rights conferred and obligations imposed thereby, beyond the mere passing of the title."

It is clear, we think, that the court did not err in this case, in overruling the appellants' demurrer to the appellee's complaint.

2. In their brief of this cause in this court, the appellants' counsel have failed to discuss any question, or present any point, arising under the second alleged error—the overruling of the motion for a new trial. We conclude, therefore, that the second error is waived. This is now the established practice of this court, and we can see no good reason for deviating from this reasonable and well settled rule, in the case at bar. *Breckenridge v. McAfee*, 54 Ind. 141; *Graeter v. Williams*, 55 Ind. 461; *Roche v. The Roanoke Classical Seminary*, 56 Ind. 198.

We find no available error in the record.

The judgment is affirmed, at the appellants' costs.

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CHATTEL MORTGAGE.—*Identity of Note Secured and Property Mortgaged.*
 —*Evidence.*—*Judgment on Note.*—*Subsequent Foreclosure.*—*Attorney's Fees.*

—A chattel mortgage executed to secure the payment of a series of promissory notes described them simply by giving the date, amount and maturity of each, but named neither the payee nor maker, and described the mortgaged property simply as “one steam saw-mill, and fixtures thereunto belonging,” etc. The note last maturing, being the only one unpaid, and stipulating for an attorney's fee, was put into judgment, for the amount of the principal, interest and attorney's fee, in a simple action on the note, against the maker, by an assignee, who thereupon assigned the judgment to the payee, who was also the mortgagee, and who brought suit on said judgment, to foreclose the mortgage against the mortgagors and the remote purchaser of the mortgaged property, who answered by general denial and also by alleging payment of the mortgage debt to the plaintiff by a purchaser of the mortgaged property, a failure of the plaintiff to release the mortgage, his subsequent assignment of the same to another, and that said defendant had thereafter purchased the mortgaged property, *bona fide* and without notice of the mortgage.

Held, that evidence identifying the property and promissory note described in the mortgage, as being the note and property in controversy, was proper.

Held, also, that such judgment and the assignment thereof, and the papers filed in the action wherein the judgment was obtained, as also the mortgage, were admissible in evidence.

Held, also, that the rendition of judgment on the note was no bar to the action for foreclosure.

Held, also, that an attorney's fee for taking judgment in the foreclosure suit can not be recovered.

PRACTICE.—*Order of Admitting Evidence.*—*Judicial Discretion.*—It is within the discretion of the court, in a proper case, to allow a party to introduce original evidence after the hearing of evidence has closed.

From the Jackson Circuit Court.

W. K. Marshall, for appellants.

B. H. Burrell and *F. Emerson*, for appellee.

PERKINS, J.—The following is a copy of an executed note :

“\$500.

“CLEAR SPRING, IND., Oct. 15th, 1869.

“Twenty-one months after date, we promise to pay to

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the order of D. T. Hinkle & Bro. five hundred dollars, value received, without any relief from valuation or appraisement laws of the State of Indiana, with interest at ten per cent. per annum from time due till paid. If this note be collected by suit, the judgment shall include a reasonable fee for plaintiff's attorney.

"Due July 15th, 1871.

JAMES RAMEY,

"DANIEL E. RAMEY."

The following is a copy of the mortgage executed to secure the payment of said note:

"This indenture witnesseth, that James Ramey and Daniel E. Ramey, of Jackson county, Indiana, mortgage and warrant to David T. Hinkle and William A. Hinkle the following personal property, to wit: One steam saw-mill and fixtures thereunto belonging; also, the team and wagons, consisting of five yoke of oxen and two log wagons, with the chains thereunto belonging; to secure the payment of five notes, bearing date of 15th day of October, 1869, of five hundred dollars each; one due in three months, one in six months, one in fifteen months, one in eighteen months, and one in twenty-one months, from date of said notes.

"In witness," etc.

"JAMES RAMEY, [SEAL.]

"DANIEL E. RAMEY." [SEAL.]

The mortgage was duly executed and recorded.

The note described in the complaint is the last of the above mentioned series.

The following endorsements are upon said note:

"March 24th, 1870, received \$100.

"J. L. & W. A. HINKLE."

"For value rec'd, we assign this note to C. L. Wayman, Dec. 5th, 1870.

JACOB L. HINKLE,

"WILLIAM A. HINKLE."

On the 15th day of August, 1871, said Charles L. Wayman obtained a judgment, in the Jackson Circuit Court,

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Indiana, for the sum of four hundred and three dollars and thirty-five cents, on said note, against James Ramey and Daniel E. Ramey.

On the 25th day of November, 1871, said Charles L. Wayman duly assigned said judgment to David T. Hinkle.

At the September term, 1874, said David T. Hinkle commenced suit to foreclose said mortgage. He made John W. Holmes a party defendant, he, at the time, claiming to own said mortgaged property.

In his complaint he set out the judgment above mentioned, of which the plaintiff is the owner by assignment to him.

Defendant Holmes answered in four paragraphs:

1. The general denial;
2. Payment, before the commencement of this suit, by Seaman & Brown, the then owners of the mortgaged property;
3. That James and Daniel E. Ramey sold the mortgaged property, in the complaint described, to William Seaman and John N. Brown, partners, subject to said mortgage; that said Seaman & Brown, long before the commencement of this suit, paid said mortgage debt in full to said David T. Hinkle, who was then the sole owner of said mortgage by assignment in writing; that said David T. Hinkle, instead of receipting said mortgage, assigned the same in writing, in the following words endorsed thereon: "For value received, we assign this mortgage to Seaman & Brown, David T. Hinkle," and delivered said mortgage to Seaman & Brown, who have since held and now hold the same; that afterward said Seaman & Brown sold and delivered said mortgaged property to William Terrell, free and clear of all incumbrances whatever; that afterward said William Terrell departed this life intestate, and his administrator sold said property, except the oxen and one wagon, to said John W. Holmes, free and clear of all

liens and incumbrances whatever, at and for the price of five hundred dollars, which this defendant has paid in full, and which was the fair cash value of said property at the time of his said purchase ; and this defendant, since his said purchase, has laid out and expended the further sum of one hundred and fifty dollars in repairing and improving said property ; that, when this defendant purchased said property, he had no notice, knowledge, information or belief that said plaintiff, or any other person, held or claimed to hold any lien or incumbrance of any sort or interest in said property. And this defendant avers, that he is a purchaser of said property in good faith, and for a good, sufficient and valuable consideration ;

4. The fourth paragraph sets up affirmative matters, by which it is claimed that the plaintiff is estopped from setting up any lien on said property, under and by virtue of said mortgage.

Demurrers to the third and fourth paragraphs of answer severally were overruled, and exceptions entered.

Reply by Hinkle, in denial of the second, third and fourth paragraphs of answer.

Default by James and Daniel E. Ramey.

Trial of the issues between the plaintiff and the defendant Holmes, by jury ; verdict for the plaintiff, as follows :

“ We, the jury, find for the plaintiff, and assess his damages, as against the said James and Daniel E. Ramey, for the sum of six hundred and thirty-one dollars and sixty-seven cents, including an attorney's fee of forty-seven dollars and fifty cents ; and we further find, that the said plaintiff is entitled to have the mortgage foreclosed, as to the steam saw-mill and fixtures mentioned in said mortgage, as to all of said defendants.”

Defendant Holmes moved for a new trial, upon the following assigned causes :

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1. Verdict not sustained by the evidence;
2. Verdict contrary to law;
3. Excessive damages;
4. Error of the court in admitting the mortgage in evidence;
5. Error of the court in admitting in evidence Wayman's judgment against the Rameys;
6. Error of the court "in admitting in evidence the files" in the case of said Wayman against the Rameys;
7. Error in the court in admitting in evidence what purported to be an assignment of the Wayman judgment to the plaintiff;
8. Error of the court in permitting proof of the signature to the said assignment;
9. Error of the court in permitting proof that the note mentioned in the complaint was one of those given for the mill, etc.;
10. Error of the court in permitting the plaintiff to testify that said note was one of the notes secured by the mortgage, in the complaint described;
11. Error of the court in permitting proof as to a reasonable attorney's fee; and,
12. Error of the court in permitting the plaintiff to give original evidence after once having rested.

The motion was overruled and exception saved.

Personal judgment against the Rameys for the amount of the verdict, and for a foreclosure of the mortgage against all the defendants.

The only error assigned in this court is the overruling of the motion for a new trial.

There was no demurrer to the complaint, or motion to strike out its exhibits. No instructions were asked or given to the jury. It will be observed also that the mortgage is foreclosed only upon the mill and fixtures. The oxen and wagons are not embraced in the decree.

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The main question in the cause is one of fact, viz.: Was Holmes a *bona fide* purchaser of the mill? If the mill had been bought and sold subject to the mortgage, the purchasers having, at the time, actual notice of the identity of the mill purchased with that described in the mortgage, they would not have been *bona fide* purchasers. We do not decide that they would necessarily have been *bona fide* purchasers in the absence of such actual notice; but with such notice they certainly would not have been. Perhaps the record of the mortgage should have put them on inquiry. Holmes alleged in his answer, that he was a *bona fide* purchaser. This allegation was denied by the reply, and its truth was in issue on the trial of the cause.

The jury found in favor of the plaintiff.

The court, which heard the evidence and saw the witnesses while giving it, and could judge of it better than this court can, was satisfied with the verdict.

There was no error in admitting in evidence the exhibits set forth in the complaint, nor in admitting proof of the identity of the note described in the complaint with that described in the mortgage, nor of the mill described in the complaint with that mentioned in the mortgage. *Duke v. Strickland*, 43 Ind. 494.

A personal judgment on the note secured by the mortgage was no bar to a subsequent suit to foreclose the mortgage. *O'Leary v. Snediker*, 16 Ind. 404; *Jenkinson v. Ewing*, 17 Ind. 505; *Duck v. Wilson*, 19 Ind. 190.

The court did not err in its ruling on the admission of evidence.

The permitting evidence to be introduced out of its regular order was a matter in the sound discretion of the court. That discretion does not appear to have been abused in this case. *Bicknell Civil Prac.* 218.

The questions of notice, good faith, payments, etc., were for the jury, and were decided in favor of the plaintiff, upon the evidence.

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The claim that the damages were excessive arises thus:

In the suit upon the note an attorney's fee was recovered. In the subsequent suit to foreclose the mortgage securing the note, a second attorney's fee was recovered. Was the allowance of this second attorney's fee legal?

That the two suits could be prosecuted, and the two judgments recovered, is shown by the cases above cited. But the mortgage did not contain a stipulation to pay an attorney's fee on its foreclosure. Did the stipulation in the note for an attorney's fee cover one for the suit to obtain a personal judgment thereon and another for the suit to foreclose the mortgage, should such suit be brought? It would have embraced the fee in the foreclosure suit, but we think but one attorney's fee should have been allowed.

If the plaintiff will remit forty-seven dollars and a half thereof within twenty days from the filing of this opinion, the judgment and decree in this suit will be affirmed for the balance, with costs. Otherwise, it will be reversed, with costs.

CUNEO v. BESSONI.

INSANE PERSON.—Inquest of Lunacy.—Judgment.—Appeal to Supreme Court.—The defendant in a statutory inquest of lunacy may personally appeal to the Supreme Court from a judgment rendered upon a verdict declaring him to be a person of unsound mind.

SAME.—Testimony of Expert.—Witness.—The testimony of an expert, in relation to the sanity of a person, should be tested by the same general rules as the testimony of other witnesses.

From the Ripley Circuit Court.

G. Durbin and *J. O. Cravens*, Prosecuting Attorney, for appellant.

W. D. Willson, *C. H. Willson* and *S. M. Jones*, for appellee.

NIBLACK, J.—Joseph Bessoni filed in the court below a

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statement in writing, in the form of a complaint, representing to said court, that Catharine Cuneo, of the county of Ripley, was a person of unsound mind, and incapable of managing her own estate; whereupon a summons was issued to the said Catherine, requiring her to appear and answer such complaint.

In response to such summons the said Catherine appeared in court, and James W. Pate, the clerk of said court, under the direction of the court, filed an answer denying the facts set forth in the complaint.

The issue thus formed was submitted to a jury for trial, and a verdict was returned:

“ We, the jury, find, that Catharine Cuneo is a person of unsound mind, and incapable of managing her own estate.”

A motion was then made, by and on behalf of the said Catharine, for a new trial, which was overruled.

Judgment having been rendered in accordance with the verdict, one Adam Stockinger was appointed guardian of the person and estate of the said Catharine, and she has appealed to this court, assigning for error the overruling of her motion for a new trial.

The appellee has moved to dismiss the appeal, upon the ground that the record shows the appellant to have been declared a person of unsound mind, and placed under guardianship, and that, hence, she is incapable of prosecuting the appeal in her own name.

It is unquestionably true, as a legal proposition, that a person who has been declared insane, and placed under guardianship, can only prosecute or defend an action by guardian or committee. *Meharry v. Meharry*, 59 Ind. 257; *Aldridge v. Montgomery*, 9 Ind. 302.

But we can not hold, that a person has been declared of unsound mind so long as the proceeding instituted for the purpose of having him or her so declared remains pending and undisposed of.

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The appeal in this case is but a continuation, in another form, of the proceeding against the appellant below, which proceeding was, in its essential characteristics, an adversary proceeding, in which the appellant was the real defendant, the clerk being only required to make an issue on her behalf. 2 R. S. 1876, p. 599, sec. 2; *Melton v. The State*, 9 Ind. 452.

We are of the opinion, that an appeal lies to this court from such a proceeding, and that, in this case, the appellant is entitled to prosecute her appeal here, so as to test the regularity of the proceedings by which it is sought to place her under guardianship. We know of no rule which prohibits her from personally contesting her alleged unsoundness of mind, so long as it is an open question.

The appellee's motion to dismiss the appeal can not, therefore, be sustained.

Several witnesses testified on each side upon the trial, and there were material differences between many of the witnesses as to the apparent mental condition of the defendant.

One of the witnesses who testified on behalf of the defendant was a physician who had been acquainted with her for several years, and who had attended her professionally a few months before the time of the trial.

The court, on its own motion, gave the jury a series of instructions. One of the instructions thus given, known as No. 5, was as follows:

"Medical witnesses may testify and give an opinion from a hypothetical case, as, having seen the person, may give an opinion, without detailing or testifying to facts upon what to base the opinion. The opinion of a medical witness may be entitled to more or less weight, depending upon the circumstances. A hypothetical case is a supposed state of facts. Where the attorney, in the form of a question put to the witness, supposes that the per-

son whose condition of mind is unsound did certain things and made certain statements, and asks for his opinion upon the supposed state of facts, this is asking the opinion of the witness upon a hypothetical case.

“The weight to be given to the opinion expressed by the witness depends upon, 1. Whether the hypothetical case is proven; 2. The importance of the supposed state of facts; 3. The experience of the witness in this branch of his profession, and the reasons given for his conclusion.

“If the hypothetical case is not proven, then the opinion based upon it is entitled to no weight. If proven, if the facts are such as to readily indicate to any one—whether a professional or non-professional person—insanity, the opinion of the witness would be entitled to more weight than when it would be more difficult to determine from the supposed case whether the mind is unsound or not. The less experience a professional witness has, and the less satisfactory his reasons for his opinion, the less weight should the opinion have.

“As to all the witnesses, whether medical or not, you are the exclusive judges of the weight to be given to the evidence.”

This instruction impresses us as having been hastily written, and not in all respects carefully considered. The precise meaning intended to be conveyed by some portions of it is not to us entirely clear. This doubtless results either from inadvertence or some mistake in copying. But, however that may be, we think the instruction as a whole, laid down too narrow and too inflexible a rule, for the estimation of the weight to be given to the testimony of an expert, and limited too closely the various matters which the jury were entitled to consider while weighing such testimony. It gave too much prominence to the mere experience of the expert, leaving out of view his opportunities, his aptitude, his skill, and other possible qualifications.

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It did not leave the jury at liberty to apply the same general rules to the testimony of experts, that were applicable to the testimony of other witnesses, when estimating its value, which was erroneous. *Eggers v. Eggers*, 57 Ind. 461.

It is quite apparent to us, that the instruction above quoted was erroneously given, and that, in consequence, the court below erred in refusing to grant the appellant a new trial.

The judgment is reversed, at the costs of the appellee, and the cause remanded for a new trial.

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CRIMINAL LAW.—Malicious Trespass.—Removing Partition Fence.—Notice.

—The owner of a fence which is a partition fence between his land and that of an adjoining proprietor may, if the land of the latter be unenclosed, remove such fence without giving him any notice thereof.

SAME.—The fact that such removal is made by the owner after allowing the adjoining proprietor to connect therewith a fence which the latter is erecting to enclose his land, but has not completed, does not make the former guilty of malicious trespass.

SAME.—“*Inclosure.*”—To constitute an “inclosure,” as used in section 28 of the act “concerning inclosures,” etc., 1 R. S. 1876, p. 497, the fences, including the partition fence, must surround some part of the land adjoining.

From the Huntington Circuit Court.

J. C. Branyan and *C. W. Watkins*, for appellant.

T. W. Woollen, Attorney General, for the State.

WORDEN, J.—Information against the appellant for malicious trespass, in tearing down and removing certain fences.

Conviction.

New trial denied, and exception.

The facts were, as shown by evidence, that the defendant and one Charles E. Satterthwaite were adjoining proprietors of land, that of Satterthwaite lying east of that of the defendant. A public road ran along the north side of these lands. The defendant had a fence along the east side of his land, running to the north-east corner thereof.

Satterthwaite's land had been unenclosed, it being woodland, but he desired to enclose it, and he procured the consent of the defendant to connect his fence, which was to run on the north side of his land, with the fence of the defendant at the north-east corner of his land.

Accordingly, Satterthwaite commenced building his fence, commencing at the north-west corner of his land, and there connecting with the defendant's fence; but, before he had got his land enclosed, or the fence built along the entire north line of his land, the defendant concluded that he wanted a lane along the east side of his land, and he took his fence in some distance, and took down that portion of Satterthwaite's fence which connected with his, as above stated. This was the trespass complained of.

The court charged the jury, among other things, as follows:

“If the proof shows that the defendant had consented that Satterthwaite might attach his fence to that of the defendant, the question of whose land the fence charged to have been torn down was [upon] is immaterial in considering this case. If the defendant gave the prosecuting witness, Satterthwaite, leave to attach his fence to his, then the only way he could remove it, or his fence back from it, was by giving Satterthwaite six months' notice, in writing, before he moved it; no difference whether Satterthwaite had completed the enclosure or not, if the fence was unlawfully injured, and the other material allegations are proved.”

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We think this charge was wrong, in respect to the point that, if the defendant had given Satterthwaite leave to attach his fence to that of the defendant, the defendant could not move his fence back from it without having first given Satterthwaite six months' notice, in writing, and that it made no difference whether Satterthwaite had completed his enclosure or not.

The statute provides, that, "When any party shall cease to use his lands, or shall lay open his enclosures, he shall not take away any part of his fence which forms a partition fence between him and the inclosure of any other person, until he shall have first given six months' notice to such person or persons as may be interested in the removing of said fence, of his intention to remove the same." 1 R. S. 1876, p. 497, sec. 23.

It seems to us, that, according to the letter and spirit of this statute, the owner of a fence, which is a partition fence between his land and that of another, may remove it at any time, without notice to the adjoining proprietor, unless the adjoining land be enclosed. The object of the notice is to give the adjoining proprietor an opportunity to protect his enclosure from trespassing animals that might otherwise come upon it after the partition fence is removed.

Where the adjoining land is not enclosed, the owner thereof is in no worse condition, as to trespassing animals, after the partition fence is removed, than before.

It seems to us also, that, to bring a case within the statute, the adjoining land must be enclosed. A fence only partly enclosing the land, would not make it an "inclosure." To constitute the "inclosure," we think the fences, including the partition fence, must surround the adjoining land or some part of it.

On account of the error in the instruction, the judgment will have to be reversed.

The judgment below is reversed, and the cause remanded for a new trial.

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CRIMINAL LAW.—Witness.—Child Under Ten Years of Age.—The question, as to whether or not a child under ten years of age is capable of understanding the facts about which it is to be examined, is to be determined by the court in which such child is offered as a witness, upon the answers of the child to interrogatories put to it by the court.

SAME.—Judicial Discretion.—Supreme Court.—The determination of such question by the court will not be reviewed by the Supreme Court on appeal, except for a clear abuse of its discretion.

SAME.—Misconduct of Juror.—Taking Notes of Evidence.—The act of a juror in taking notes of the evidence being given is not misconduct sufficient to set aside the verdict, where he, upon being admonished by the court of the impropriety of his act, ceased taking notes.

SAME.—Verdict.—Fixing Term of Imprisonment.—The fact that the jury, in fixing upon the term of imprisonment to be suffered by the defendant, took the quotient arising from the division of the aggregate of the periods indicated by each juror by the number of jurors, as a proposition merely of the term of imprisonment, is not improper, if not done pursuant to a previous agreement to accept such quotient as such term.

SAME.—Newly-Discovered Cumulative or Impeaching Evidence.—A new trial will not be granted on the ground of newly-discovered evidence which is merely cumulative or impeaching.

SAME.—Reasonable Doubt.—Supreme Court.—Where, from the evidence, the Supreme Court, on appeal, is satisfied that a reasonable doubt of the guilt of the defendant manifestly exists, a judgment of conviction will be reversed.

From the St. Joseph Circuit Court.

W. G. George, for appellant.

T. W. Woollen, Attorney General, and G. Ford, Prosecuting Attorney, for the State.

PERKINS, J.—An indictment as follows was duly returned into the St. Joseph Circuit Court.

“The grand jurors for the county of St. Joseph, in the State of Indiana, good and lawful men, duly and legally empanelled, sworn and charged in the St. Joseph Circuit Court of said State, at the December term, 1878, to inquire into felonies and certain misdemeanors in and for the body of said county of St. Joseph, in the name and by the

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authority of the State of Indiana, on their oath do present, that one John Batterson, late of said county, on the 23d day of November, A. D. 1878, at said county and State aforesaid, did then and there, in a rude, insolent and angry manner, unlawfully and feloniously touch one Sarah A. Mell, a woman child, then and there under twelve years of age, and did then and there unlawfully and feloniously have carnal knowledge of her, the said Sarah A. Mell, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

“GEORGE FORD, Prosecuting Attorney.”

Answer, not guilty.

Wm. G. George, an attorney, was appointed to defend the accused, as a poor person.

The court made the following further entry :

“And it appearing that Doctors Levi J. Ham, Robert Harris, R. P. Barbour, Joel Harris, Thomas McDonald, Josephus Davis, James Dorward, L. Humphries and Daniel Dayton, have been subpoenaed as medical witnesses to testify as experts in this behalf. It is ordered by the court that each be allowed the regular witness fee provided by statute, and that the clerk of this court certify the same to the auditor of St. Joseph county for payment, and day is given.”

A jury trial followed, in which the defendant was convicted and awarded, as punishment, twelve years in the state-prison.

A motion for a new trial was overruled, judgment rendered, and sentence pronounced thereon upon the verdict.

The error assigned on appeal to this court is, overruling the motion for a new trial.

The following are the grounds specified in the motion for a new trial :

1. Verdict not sustained by the evidence;

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2. The permitting Sarah A. Mell to testify as a witness, over the objection of the defendant ;

3. Misbehaviour of the jury ;

4. Newly-discovered evidence.

We will consider last the first ground in the motion for a new trial.

We copy from the record the statement of the facts touching the admission of Sarah A. Mell to testify as a witness, and also the testimony she gave, as follows :

“ Thereupon the plaintiff introduced as a witness Sarah A. Mell ; to the introduction of which witness the defendant objected upon the ground of incompetency, she being under the age of ten years, and incapable of properly understanding the facts about which she was to be examined.

“ Thereupon the court made of said Sarah A. Mell the following inquiries, and received answers as follows :

“ ‘ What is your name ?

“ ‘ Sarah Mell.

“ ‘ How old are you ?

“ ‘ Five years and a half.

“ ‘ Do you know what it is to take an oath ?

“ ‘ Yes sir.

“ ‘ Would it be incumbent on you to tell the truth if you are sworn ?

“ ‘ Yes, sir.

“ ‘ Would it be wrong to tell a lie ?

“ ‘ Yes, sir.

“ ‘ Do you know it is more incumbent on you to tell the truth when sworn in court than if you were not ?

“ ‘ Yes, sir.

“ ‘ Do you know that you would be punished if you were to swear to a lie ?

“ ‘ Yes, sir.

“ ‘ Who told you it was wrong to swear to a lie, and that you would be punished for it ?

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“ ‘My pa and my ma both told me so.’

“ Thereupon the court ordered the said Sarah A. Mell to be sworn and examined as a witness; to which order and ruling of the court the defendant, at the time, duly objected and excepted, and does now object and except.

“ Sarah A. Mell, being duly sworn, testified as follows, to wit: (She was questioned by Mr. Anderson thus:)

“ ‘What is your name?

“ ‘Sarah A. Mell.

“ ‘Where do you live? Do you know what town you live in?’

“ The witness shook her head.

“ ‘Where does your father work?

“ ‘On the railroad.

“ ‘What is your father’s name?

“ ‘Joel Mell.

“ ‘What is your mother’s name?

“ ‘Lizzie Mell.

“ ‘Do you know Batterson?’ (Pointing to the defendant.)

“ ‘Yes, sir.

“ ‘What is his name?

“ ‘John Batterson.

“ ‘Do you know of his being at your house a while ago?

“ ‘Yes, sir.

“ ‘When did you see him, in the night or in the morning?

“ ‘I didn’t see him at all.

“ ‘Did you know of his being in bed with you?

“ ‘Yes, sir.

“ ‘Did he hurt you?

“ ‘Yes, sir.

“ ‘Did any one else hurt you, at all?

“ ‘Only just him; that’s all.

“ ‘Did you tell your mother of it next morning?

“ ‘No, sir.

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“ ‘ Who, then ?

“ ‘ My aunt Em.

“ ‘ Is she here ?

“ ‘ Yes, sir.

“ ‘ Is that her over there ?

“ ‘ Yes, sir.

“ ‘ Why didn’t you tell your mother ? ’

“ No answer.

“ ‘ Is your own mother here ? is this your mother ? ’

(Pointing to Mrs. Mell.)

“ ‘ Yes, sir ; one of my mothers is dead.

“ ‘ Did you tell this mother about it ?

“ ‘ No, sir.

“ ‘ Why didn’t you tell her ? were you afraid ?

“ ‘ Yes, sir.

“ ‘ How came you to tell your aunt Emily ?

“ ‘ I went over to her house.

“ ‘ Who were you playing with ?

“ ‘ I wasn’t playing at all.

“ ‘ Had your aunt a little girl over there ?

“ ‘ Yes, sir ; two little girls.

“ ‘ What were their names ?

“ ‘ Lina and Birdie.

“ ‘ Were they as big as you ?

“ ‘ Yes, sir ; just the size.

“ ‘ How did he hurt you ? ’

“ No answer.”

Here her examination ended. There was no cross-examination.

The statute on this subject, 2 R. S. 1876, p. 132, enacts, that “ Persons insane at the time of examination, children under ten years of age and incapable of properly understanding the facts about which they are examined, * * * shall not in any case be competent witnesses, unless,” etc.

A child under ten years of age is not absolutely incom-

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petent to testify as a witness, but only when such child is incapable of properly understanding the facts, etc. And, whether a child under ten years of age is incapable of so understanding the facts, etc., is a question for the court in which the child is offered as a witness, and to be determined upon the answers of the child to such interrogatories as may be put to it by such court. 2 R. S. 1876, p. 133, notes. In this case, the court was satisfied of the competency of the child to testify. We can not say that the court erred in its ruling. It would require a case of manifest abuse of discretion to authorize this court to interfere.

The third ground, stated in the motion for a new trial, was misbehavior of the jury. It specifies two particulars wherein the misbehavior consisted:

1. Taking notes during the trial by a juror; and,
2. Finding the verdict by chance.

The record contains this statement:

“And here the judge of the court, seeing a juror taking notes, said to the jury: ‘It is improper for jurors, in the trial of a cause, to take notes of the evidence. The jury must depend only upon their memory.’ And thereupon said juror immediately discarded his pencil and paper, and ceased taking notes or writing.”

The other item of misbehavior is thus charged:

“That the length of time of imprisonment of the defendant in the penitentiary, as his punishment, was determined by adding together the several numbers of years named by the several jurors, dividing the aggregate by twelve, and making the quotient the verdict, as to the question of punishment.”

Misconduct of the jury must be such, to justify the setting aside of a verdict therefor, as to raise a presumption that the defendant might have been injured by such misconduct. See *Cluck v. The State*, 40 Ind. 263. No such

presumption arises in the facts on this case. The only evidence relied on to sustain the second item of the charge of misbehavior is a paper found in the jury room, after the jury had left it, containing twelve numbers added together, and the sum of the addition divided by twelve, giving a quotient of twelve and one-half.

In *Dunn v. Hall*, 8 Blackf. 82, it is said: "The law is well settled that in actions for unliquidated damages, the jury may adopt the process resorted to in this case, to obtain a medium sum to be submitted as a proposition for a verdict; and it is equally well settled, that it must not be adopted pursuant to an agreement to be bound by its result. *Harvey v. Rickett*, 15 Johns. 87; *Dorr v. Fenno*, 12 Pick. 521." *Alexander v. Thomas*, 25 Ind. 268.

If we can infer that the paper was one showing the figuring of the jury in reference to a verdict as to the extent of punishment of the defendant in this case, we can not infer that there was any agreement to be bound by the result of such figuring.

The fourth ground specified in the motion for a new trial was newly-discovered evidence.

The alleged-newly discovered evidence was mostly cumulative or impeaching, and hence not a sufficient cause to justify the court in granting a new trial.

The following is one of the affidavits:

"Ella Willis, having been duly sworn, says, that she was, in the month of November, 1878, a resident of New Carlisle, in St. Joseph county, and State aforesaid; that, during her residence in New Carlisle, she became acquainted with Mrs. Elizabeth Mell, wife of J. J. Mell, the father of Sarah; that, in a conversation she had with Mrs. Mell, on or about the 18th day of November, 1878, Mrs. Mell stated to this affiant, in answer to an inquiry as to the health of her family, that her (Mrs. Mell's) family were all well, with the exception of the little girl, Sarah A. Mell, who

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had trouble with her urinary organs, and was suffering severely."

This affidavit was duly signed and verified.

To show the materiality and importance of the facts stated in the affidavit, it will be necessary to give a brief statement of the facts of the case, as disclosed by the evidence :

Sarah A. Mell lived with her father and step-mother, in New Carlisle, St. Joseph county, Indiana. Her father worked on the railroad. On the 23d of November, 1878, about nine o'clock in the evening, Batterson, the appellant, a brakeman on the railroad, called at the house of Mell, the father of Sarah. He was told that he could stay all night, if he would sleep in the trundle-bed, with Sarah. Sarah was then asleep in it. Mell had no other bed except that occupied by himself and wife. Batterson slept in the trundle-bed with Sarah, which was close beside the bed in which Mell and his wife slept. Nothing was heard of Batterson and Sarah during the night; no outcry, though the forcing of a passage into so young a child, by a grown man, must have been attended with excruciating pain and suffering. Mell was awake and up once in the night. When he got up in the morning Batterson and Sarah were in bed awake, she lying on Batterson's arm. No marks of violence were visible on the body of Sarah. This was Sunday morning. Batterson got up; Mell asked him to stay to breakfast; he declined, and started to the depot. On Monday it was noticed that Sarah walked a little lame; also on Tuesday—Mell thought her feet hurt her, and got her a pair of shoes. She grew worse, and was confined to her bed some length of time. Batterson had, for some time previous, occasionally visited at Mell's house. Sarah made no complaint on Sunday or Monday. "On Tuesday," said her aunt Emily, "she made complaint to me. I examined her. I found her in a bad condition; sent her home," etc.

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On Tuesday, the 26th of November, Drs. Harris and McDonald were called in, and examined Sarah, at her father's house; found, as they believed, laceration of the hymen, and, in fact, her private parts swollen, and thought there had been penetration. On subsequent visits they discovered gonorrhœa, as they took it to be. Several physicians visited the jail, and examined the exposed private parts of Batterson, some of whom swore that they showed slight indications of venereal disease, but the greater number of them swore that they did not.

The case, on the evidence, is this: On Saturday night, the 23d of November, Batterson slept with Sarah, under the circumstances above detailed. He had, therefore, the opportunity to violate her person, but nothing appeared tending to prove that he did so, till the Tuesday following, when, on examination, she appeared to be affected with venereal disease, and to have been sexually violated at some time and place, by a man. On inference, then, from the two facts, that Batterson had the opportunity, and that he possibly might have had venereal disease, the verdict against him must mainly have been rested.

In cases of this kind, the rule of law is, that the evidence must establish the guilt of the defendant beyond a reasonable doubt, to justify a verdict of guilty. It requires no argument to show that such was not the evidence in this case.

The judgment is reversed, and the cause remanded for a new trial, all of which is to be certified, and the prisoner to be returned from the prison, for trial, etc.

FOXWELL v. THE STATE.

CRIMINAL LAW.—*Failure of Defendant to Testify.—Instruction.—Waiver.—*

Where the defendant in a criminal prosecution does not testify on the

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trial, he can not complain of the omission of the court to instruct the jury, under section 90 of the criminal code, 2 R. S. 1876, p. 895, in relation to his failure to testify, if he has not requested the court to so instruct.

From the Rush Circuit Court.

J. Q. Thomas and J. J. Spann, for appellant.

T. W. Woollen, Attorney General, for the State.

NIBLACK, J.—This was a prosecution for murder in the first degree.

The indictment charged the appellant, Harry T. Foxwell, with the murder of John W. White.

Upon an arraignment, a plea of not guilty and a trial by a jury, a verdict was returned finding the appellant guilty as charged, and fixing his punishment at imprisonment for life.

A motion for a new trial was interposed and overruled, and judgment followed upon the verdict.

Error is assigned here upon the overruling of the motion for a new trial.

One of the causes assigned for a new trial, and the only one discussed by counsel for the appellant, was :

“Because the court failed to instruct the jury in a material point of law, as the statute directs he shall do, viz.: That the failure of the defendant to testify in his own behalf ‘shall not be commented upon, or referred to in the argument of the cause, nor commented upon, referred to or in any manner considered by the jury trying the same.’”

The appellant did not offer himself as a witness, nor testify in his own behalf, upon the trial, but the record does not inform us that his failure to testify was either commented upon, or referred to in the argument, or in any manner considered by the jury while trying the cause.

The statute prescribing who shall be permitted to testify in criminal causes says :

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“The following persons are competent witnesses :

* * * * *

“*Fourth.* The defendant to testify in his own behalf, but if the defendant do not testify, his failure to do so shall not be commented upon, or referred to in the argument of the cause, nor commented upon, referred to or in any manner considered by the jury trying the same, and it shall be the duty of the court, in such case, to instruct the jury as to their duty under the provisions of this section.” 2 R. S. 1876, p. 395, sec. 90.

The court instructed the jury generally as to the law defining the different degrees of homicide and prescribing the punishment therefor, and as to the rules governing the trial of criminal causes, but did not instruct them as to their duty where the defendant had failed to testify in his own behalf, as provided by the section of the statute above quoted.

No objection is urged to the instructions which were given by the court, and no question is made here upon any of those instructions. We assume, therefore, that the instructions thus given gave the law correctly to the jury, as to all the subject matters embraced within them, and to which they were directed.

It has been repeatedly decided by this court, that a cause will not be reversed because the instructions did not cover all the points which arose upon the trial, provided the instructions were correct, so far as they may have gone.

The rule in such a case is, that the party complaining of an omission in the instructions must ask the court for an instruction covering the omission, or some material portion of it, before he can make any question as to such omission in this court. The failure of such party to ask an instruction, at the proper time, to supply such omission, operates as a waiver of any objection to such omission, and leaves him without any question reserved for decision here.

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As to the omission complained of in the case before us, it is not shown that the appellant asked any instruction to supply it, or that he otherwise requested the court to instruct the jury as to their duty, upon his failure to testify in his own behalf. Under such circumstances, he must be deemed to have acquiesced in such omission, and to have foregone his opportunity to reserve any question upon it.

We see no error in the proceedings below.

The judgment is affirmed, at the costs of the appellant.

THE STATE v. STEPHENS.

CRIMINAL LAW.—*Open and Notorious Fornication.*—*Indictment.*—An Indictment charged, that, on and from a certain day, until another specified day, at a certain county in this State, the defendant “unlawfully lived in open and notorious fornication together with one” E. E., “a woman,” etc. *Held*, on motion to quash, that the indictment sufficiently charges the alleged fornication.

From the Wabash Circuit Court.

T. W. Woollen, Attorney General, *M. Good*, Prosecuting Attorney, and *A. Davis*, for the State.

M. H. Kidd, for appellee.

BIDDLE, J.—The appellee was indicted for living in open and notorious fornication, under the following section of the act defining and prescribing the punishment of misdemeanors:

“SEC. 21. Every person who shall live in open and notorious adultery or fornication shall be fined in any sum not exceeding one thousand dollars, and imprisoned not exceeding twelve months.” 2 R. S. 1876, p. 466.

The indictment is in the following words:

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“The grand jurors of Wabash county, in the State of Indiana, good and lawful men, duly and legally empanelled, charged and sworn to enquire into felonies and certain misdemeanors, in and for the body of said county of Wabash, in the name and by the authority of the State of Indiana, on their oaths present, that one Henry Stephens, late of said county, on the 1st day of September, A. D. 1876, at said county and State aforesaid, and from that day until the 1st day of March, 1878, in said county, unlawfully lived in open and notorious fornication together with one Eliza Enyart, a woman, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana.”

On motion of the appellant, the indictment was quashed.

The State excepted, and appealed to this court.

As the appellee has not favored us with a brief, we are not informed of the ground upon which the court quashed the indictment. It appears to us to be sufficient. This court has held, that, in an indictment for fornication, the offence need not be defined any more particularly than in the words of the statute. *Hood v. The State*, 56 Ind 263. Nor need it be averred that the woman, with whom the offence was committed, was unmarried. *The State v. Gooch*, 7 Blackf. 468. The word fornication implies, in its meaning, that the woman with whom it is committed is unmarried. Fornication is sexual intercourse between a man, married or single, and an unmarried woman; the sexual intercourse, therefore, need not be averred. *Hood v. The State, supra*.

In some of the states, as in Massachusetts, where fornication is particularly defined by the statute, and incurs special penalties when committed with certain classes of persons, the rule is otherwise; but Mr. Wharton says, that “The fact that the defendants are not married to each other need not, as a general rule, be averred, when the statutory

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term 'fornication' is used; and the precedents in use mostly rest on this view." Wharton Crim. Law, sec. 2668.

And so are the precedents in this State. See the following cases: *Wright v. The State*, 5 Blackf. 358; *The State v. Gartrell*, 14 Ind. 280; *The State v. Record*, 16 Ind. 111; *Robinson v. The State*, 57 Ind. 113.

It seems to us that the court erred in quashing the indictment.

The judgment is reversed, and the cause is remanded, with instructions to overrule the motion to quash the indictment, and for further proceedings.

McDONALD v. THE STATE.

CRIMINAL LAW.—Common Law.—Jury.—Instructions.—At common law the jury in a criminal cause were the exclusive judges of the evidence but were bound to accept, as correct, the law laid down by the court in its instructions.

SAME.—The Jury Exclusive Judges of Law and Evidence.—Province of the Court Merely Advisory.—In this State, under the present constitution, the jury in a criminal cause are the exclusive judges of both the law and the evidence, the duty of the court, in giving them instructions, being merely advisory.

SAME.—On the trial of a criminal cause the court instructed the jury, that, "If the court instruct the jury truly and fully as to the law, the jurors must be governed by the instructions. If the court does not do this, the jury may disregard the instructions."

Held, that the instruction was erroneous.

From the Fountain Circuit Court.

M. M. Milford, W. A. Tipton and S. F. Wood, for appellant.

T. W. Woollen, Attorney General, *T. L. Stilwell*, Prosecuting Attorney, and *H. H. Dochterman*, for the State.

NIBLACK, J.—The appellant, Matthias McDonald, was indicted in the court below, jointly with one Frank Gallimore, for the murder of William E. Woollen.

The allegations in the indictment constituted a charge of murder in the first degree.

The cause was submitted to a jury for trial, on a plea of not guilty, and a verdict returned finding the appellant guilty of manslaughter, and fixing his punishment at imprisonment in the state-prison for the term of six years.

After considering and overruling a motion for a new trial, the court rendered a judgment of conviction upon the verdict.

It was shown upon the trial, that there was an assemblage of persons at the time and place at which the alleged murder was committed; that, a short time before the fatal blow was struck, there was a collision between the appellant and the deceased; that, immediately thereafter, Gallimore and the deceased engaged in a fight, and that during such fight the deceased was stabbed to death by Gallimore.

The principal question upon the trial was whether the appellant had aided and abetted Gallimore in such a way as to make him guilty, as a principal, with Gallimore.

The court instructed the jury at great length, upon the various questions of law which arose in, and which were discussed during, the progress of the cause.

By proper assignments as causes for a new trial, questions were reserved, amongst other things, upon several of the instructions, and the questions thus reserved have been argued with great zeal and earnestness on both sides here.

One of the instructions to which objection was made, as above stated, and to which the most time has been devoted in the argument, was as follows: :

“The jury, in a criminal cause, are the judges of the law and the evidence. The jurors are not authorized to make a law for each case, but must decide it according to the law as it is. If the court instruct the jury truly and

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fully as to the law, the jurors must be governed by the instructions. If the court does not do this, the jury may disregard the instructions."

The subject-matter of this instruction has, at several times, in some form, engaged the attention of this court, and has been so fully and carefully ruled upon, that we find it difficult to add any thing of interest to what has already been said upon it.

In the case of *Williams v. The State*, 10 Ind. 503, upon a review of the authorities, including some previous decisions of this court, it was, in legal effect, held, that, at common law, the jury were, in criminal cases, the exclusive judges of the evidence, but were bound to believe the law to be as the court instructed them it was; but that the constitution of 1851, art. 1, sec. 19, had so changed the rule, that the jury are now the exclusive judges of the law as well as the evidence; that, while the court is still required, in criminal cases, to charge the jury as to "all matters of law which are necessary for their information in giving their verdict," 2 R. S. 1876, p. 417, sec. 113, yet that the authority of the court in thus charging the jury is advisory only, and does not deprive the jury of their right, under the constitution, to determine the law as applicable to the case which they are empanelled to try.

In the case of *Daily v. The State*, 10 Ind. 536, this court also held, that, under our present state constitution, juries have the right, in criminal cases, to determine the facts proved, and the law arising upon those facts, independently of instructions from the court, subject only to such revisory power as the court has conferred upon it, to grant new trials in certain cases where the defendant is convicted, and to thus require a jury to again determine the law as well as the facts, upon another trial.

These cases were substantially followed and approved in the more recent case of *McCarthy v. The State*, 56 Ind. 208,

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and the rules of construction which they enunciate are still recognized by this court as of binding authority, in similar cases.

In the light of these authorities, it seems to us quite evident, that it would be erroneous to charge the jury in any criminal case, that they "must be governed by the instructions," however true and full as to the law such instructions may be.

It seems to us equally evident, that it would be erroneous to charge the jury, that, if the instructions did not truly and fully inform them as to the law, they might disregard such instructions, because of the implication that would follow, that the jury would not be allowed to disregard such instructions if they gave the law correctly.

It is unquestionably the duty of the jury to give careful and respectful consideration to the instructions of the court, in every criminal cause, and not to disregard such instructions, except for some sufficient reason addressing itself to their judgment; yet, when the time for their ultimate decision upon the merits of the cause is reached, they have the right to determine, for themselves, the law as well as the facts by which their verdict shall be governed. We can not escape this conclusion without disregarding what is to us a plain provision of the constitution, and overruling a well settled line of decisions in this court, construing that constitutional provision.

As to the reasons which led to the adoption of this provision, see *Daily v. The State, supra*.

Applying the rules laid down as above to the instruction before us, it can not be fairly sustained. It did not correctly define the relations which exist between the court and the jury, on the trial of a criminal cause, and was, we think, calculated to confuse and mislead the jury as to the extent and character of those relations.

As the judgment must at all events be reversed for the

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reasons already given, we will not consider the other objections urged by counsel for the appellant to the proceedings below.

The judgment is reversed, and the cause remanded for a new trial. The clerk will issue the proper notice for the appellant's return to the sheriff of Fountain county.

WATSON v. THE STATE.

CRIMINAL LAW.—Jury.—Excusing Juror.—Judicial Discretion.—During the term of court at which a criminal cause was pending for trial, the court discharged the jury from further attendance until a later day in the term, and, at the same time, over the objection of the defendant in such cause, excused altogether certain of the jurors who had expressed an opinion that the defendant was guilty.

Held, that the court had exercised its discretion fairly, and that the defendant can not complain thereof.

SAME.—Murder.—Evidence.—Dying Declarations.—On the trial of a defendant indicted for murder, the dying declarations of the deceased are admissible in evidence when it clearly appears, that, at the time they were made, he was aware that death was rapidly approaching.

SAME.—Premeditation.—Where sufficient time has elapsed between the killing and an angry altercation between the deceased and the defendant for his anger to cool, the killing can not be excused as unpremeditated.

From the Vermillion Circuit Court.

M. G. Rhoads, R. A. Parrett and J. C. Sawyers, for appellant.

T. W. Woollen, Attorney General, *A. P. Harrell*, Prosecuting Attorney, *R. B. Sears, J. Jump and J. D. Cushman*, for the State.

BIDDLE, J.—The appellant was indicted for murder in the first degree, committed in killing Ezra Compton by shooting him, has been tried by a jury and found guilty as charged, and is now under the sentence of the law to suffer death.

He appeals to this court, and his counsel have prepared and presented for our consideration three questions:

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1. On the fourth day of the term of court at which the appellant was tried, the court, having no further need of a petit jury until the fourteenth day of the term, over the objection of the appellant, discharged the jury until said fourteenth day, but excused three of said jurors from returning on said day, upon the ground "that the three jurors who were excused were residents of the same township in which it was charged the offence, for which the defendant was indicted, was committed; that they were cognizant of all the facts, and had each publicly expressed the opinion that the defendant was guilty of the charge against him in the indictment in this cause; but it was not stated by the court whether this was the cause or not."

On the fourteenth day of the term the jurors all returned to their duty, except the three who had been so excused. When this case was called for trial, the appellant demanded to be tried by the full regular panel, "whereupon, and before the jurors were sworn, the court said to the counsel, that, if they desired the presence of the three jurors mentioned, the court would order a venire and send for them, to which the counsel only responded that they had made the objection in good faith, whereupon the court overruled the objection, and directed the sheriff to fill the vacancy occasioned by the absence of said three jurors, as aforesaid, from the special venire ordered by the court."

We do not see any error in discharging the three jurors for the reasons assigned. It was within the fair discretion of the court. The appellant was not injured by discharging the jurors who had expressed their opinions, before trial, that he was guilty of the crime charged against him, and he can not complain of the ruling. There is no point made that the jurors, who tried the case, were not all good and lawful men, as the law requires.

2. The court admitted certain dying declarations of the deceased to be given in evidence. Of this ruling the

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appellant complains because, as he alleges, the deceased was not, in fact, in a dying condition at the time he made the declarations, and, if so, he was not impressed with the fact of his approaching death.

A physician, who attended the deceased upon the day he died, testified: "The deceased suffered intense pain and was flighty. I think he was cognizant that he could not live, but did not so express himself to me. * * Do not wish to say that Compton knew he must die, but it seemed that, at last visit, it was patent to all that he must die. * * I did not tell Compton, nor any one in his presence, that he could not recover."

Other evidence shows, that, in a few minutes after he was shot, which occurred at his store, the deceased went to his house. His wife testified as follows:

"My husband said when he came in, 'Don't take on the shot will kill me; I'll not get well.' * * The morning of the next day, being the day he died, he said to me he could not get well; he said that all along, from the first to the last talk we had about it; he could scarcely speak above a whisper. He told me when and how he wanted to be buried, the same evening after he was shot. He never expressed any hope of recovery, but said all the time he could not get well. Don't think he asked for a physician at all. On Saturday morning, the day he died, he told me how the trouble occurred."

The mother of the deceased testified, that the deceased came to the house about two or three o'clock P. M., on the day he was shot; that he died about the same time on the next day, and that she was with him all the time until he died; that "He said he was killed; that he could never get well; he said, 'Mother, I never can, never can get well; I am killed.' He told me that on Saturday morning; he told me on Friday he was killed."

Upon this evidence the court, over the objections of the

appellant, permitted the dying declarations of the deceased to be given in evidence to the jury.

We believe that the rule governing the admission of dying declarations was well announced in the case of *Morgan v. The State*, 31 Ind. 193, in the following words:

“The only safe rule for the admission of such declarations is, that the declarant must be fully persuaded that death is rapidly approaching; that it is so near that all motives to falsehood are superseded by the strongest motives to strict veracity; and that the proof render this condition of the mind clear to the judge before whom it is offered.” See also *Binns v. The State*, 46 Ind. 311.

It seems to us that the evidence in this case, of the condition of the deceased, fulfils the rule as above stated, and that the court did not err in admitting evidence of the dying declarations of the deceased to go to the jury.

3. After discussing the above questions, the counsel for the appellant say:

“As to the other reasons for a new trial, that the evidence is not sufficient, and the verdict is contrary to law, we need only to ask the court to read over the evidence and consider it.”

No argument is made upon these questions by the counsel, except to state three propositions:

1. That the evidence does not disclose any motive for the murder;

2. That the quarrel between the appellant and deceased excited the appellant's anger, which did not and could not cool during the brief interval that elapsed before the shooting was done; and,

3. That there was no premeditation shown.

Perhaps so brief a statement as this would have authorized us to hold that the questions under consideration were waived for want of an argument; but, as the case is

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capital, we were not satisfied to do so. We have, therefore, fully examined and considered the evidence in the case. It convinces us that there was no reasonable cause for anger on the part of the appellant, and that, if he became angry, sufficient time elapsed for his anger to cool before he shot the deceased, and that the deed was done with premeditation.

Upon the whole case, we are satisfied, beyond a reasonable doubt, that the verdict is sustained by sufficient evidence, and that it is not contrary to law.

The judgment is affirmed, at the costs of the appellant.

FRY v. THE STATE.

CRIMINAL LAW.—Constitutional Law.—Brokerage in Railroad, etc., Tickets.—
"Ticket Scalper."—*Police Regulation.*—The act of March 9th, 1875, 1 R. S. 1876, p. 259, "regulating the issuing and taking up of tickets and coupons of tickets by common carriers," etc., is in the nature of a police regulation, is valid, and is not in conflict with the constitution of either the United States or this State.

SAME.—Impairing Obligation of Contract.—Monopoly.—Such statute does not impair the obligations of contracts, nor does it grant to any one privileges or immunities denied to others.

SAME. Inter-State Commerce.—Such statute does not violate section 8 of article 1 of the constitution of the United States, which confers upon Congress the power to regulate commerce "among the several States."

From the Marion Criminal Circuit Court.

R. B. Duncan, C. W. Smith and J. S. Duncan, for appellant.

T. W. Woollen, Attorney General, *J. B. Elam*, Prosecuting Attorney, *C. Baker, T. A. Hendricks, O. B. Hord* and *A. W. Hendricks*, for the State.

63	552
134	254
63	552
138	400
63	552
142	192
63	552
161	255

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Howk, C. J.—The indictment against the appellant, in this case, charged, in substance, that the appellant, on the 9th day of January, 1879, at and in the county of Marion, “did then and there unlawfully barter and sell, for a valuable consideration, to wit, the sum of ten dollars, to some person whose name is to the grand jurors unknown, a railroad ticket, the description and style of which said ticket is to the grand jurors unknown, for the reason that said ticket is lost and can not be found, entitling and evidencing the right of the holder thereof, to wit, the person whose name is to the grand jurors unknown as aforesaid, to travel and be transported over some railroad, the name and style of which said railroad is to the grand jurors unknown, running from the city of Indianapolis, in the county of Marion and State of Indiana, to the city of St. Louis, in the State of Missouri. The grand jurors aforesaid, upon their oath aforesaid, do further present, that, upon the said 9th day of January, A. D. 1879, at the time and place said Fry sold said ticket as aforesaid, to said person whose name is to the grand jurors unknown as aforesaid, to wit, at the county of Marion and State aforesaid, said Fry was not then and there the agent of the railroad whose name and style is to the grand jurors unknown as aforesaid, and said Fry was not then and there authorized to sell tickets or other certificates, evidencing the right of the holder thereof to travel and be transported upon said railroad, and he did not then and there have a certificate provided him by said railroad, setting forth his authority as agent of said railroad, signed by the managing officer of such railroad, and duly attested by its corporate seal; that said George W. Fry had not purchased the said ticket evidencing the right of the holder thereof to travel and be transported by said railroad from the said city of Indianapolis, in the county of Marion and State of Indiana, to the said city of St. Louis, in said State of Mis-

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souri, from an agent of said railroad authorized to sell tickets or other certificates evidencing the right of the holder thereof to travel and be transported by said railroad, and provided a certificate setting forth his authority as such agent to make such sales, signed by the managing officer of said railroad, and duly attested by the corporate seal of said railroad, with a *bona fide* intention of travelling on the same. Wherefore the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge, that said sale of said ticket, by said George W. Fry, to said person whose name is to the grand jurors aforesaid unknown as aforesaid, and in manner and form aforesaid, was and is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

The appellant moved the court to quash said indictment, which motion was overruled, and to this ruling he excepted.

On arraignment, the appellant's plea to said indictment was that he was not guilty as therein charged.

The issues joined were tried by the court without a jury, upon an agreed statement of facts, and a finding was made by the court, that the appellant was guilty as charged in the indictment.

The appellant's motion for a new trial was overruled by the court, and to this decision he excepted, and judgment was rendered against him by the court on its finding, from which judgment this appeal is now here prosecuted.

Errors have been assigned by the appellant, in this court, which call in question the following decisions of the court below :

1. The overruling of his motion to quash the indictment; and,

2. The overruling of his motion for a new trial.

In their argument of this cause, in this court, the appel-

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lant's learned counsel have expressly waived all "technical objections" to the indictment. They do not claim "that the grand jury had no legal authority to enquire into the offence charged;" nor do they claim, "that the indictment contains any matter which if true would constitute a legal justification of the offence charged, or other legal bar to the prosecution." But the appellant's motion was evidently founded upon the second statutory cause for quashing an indictment, namely, "That the facts stated do not constitute a public offence." 2 R. S. 1876, p. 399, sec. 101.

The facts stated in the indictment in this case show, very clearly, that it was intended to charge the appellant, therein and thereby, with a violation of the provisions of the 5th section of an act entitled "An act regulating the issuing and taking up of tickets and coupons of tickets by common carriers, and defining the rights of holders thereof, and other matters in relation thereto," approved March 9th, 1875. 1 R. S. 1876, p. 259.

It is earnestly insisted, by the appellant's counsel, that this entire statute is unconstitutional and void, upon the following grounds:

1. Because it is in violation of section 8 of article 1 of the constitution of the United States, which provides: "The Congress shall have power:— * * *

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

2. Because "it is also an infraction of at least two provisions of the constitution of Indiana.

"1. It impairs the obligations of contracts; * * *

"2. It undertakes to grant to carriers of passengers privileges and immunities which it does not extend to other citizens upon the same terms, or upon any terms whatever."

We will consider the appellant's objections to the con-

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stitutionality and validity of the statute, in the inverse of the order in which his attorneys have presented them. We have already given the title of the act, and for the purpose of convenient reference we will set out the entire statute, in this connection, as follows:

“SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That it shall not be lawful, from and after the taking effect of this act, for any officer or agent of any railroad company, steamboat, or other public conveyance of passengers for hire or reward, or for the operator or operators, manager or managers (or his or their agent or agents), of any such railroad, steamboat or other public conveyance, to issue or sell any pass, ticket, or coupon of a ticket, or certificate evidencing the holders' right to travel over or be transported in or upon such railroad, steamboat or other public conveyance, subject to any condition contained in or endorsed upon, or appended to such pass, ticket, coupon or certificate, whereby the liability of such carrier shall be abridged or limited, or whereby the rights of the holder of such pass, ticket, coupon or certificate shall be decreased or abridged, unless such condition shall be printed in nonpareil type, or in type or characters as large or larger than nonpareil type. Any such officer, agent, operator or manager, or the agent of such operator or manager, who shall violate the provisions of this section of the act, shall, upon conviction thereof, be fined not less than ten dollars, nor more than one hundred dollars, for each pass, ticket or coupon which he shall issue or sell, contrary to the provisions of this section: *Provided, however*, That nothing herein shall be held or construed to change, or in any manner affect, the law as it now exists, regulating the liability of common carriers, or to enlarge their right to limit, or restrict their liabilities on account of having such attempted limitation printed, as required by this act.

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“ SEC. 2. That it shall be the duty of the owner or owners, or operator or operators, of every railroad and steamboat or other public conveyance for the transportation of passengers for hire, or reward, to provide each agent, who may be authorized to sell tickets or other certificates evidencing the right of the holder thereof to travel or be transported upon such railroad, steamboat or other public conveyance, with a certificate, setting forth the authority of such agent to make such sales, which certificates shall be signed by the managing officer, and duly attested by the corporate seal of the owner or operator of such railroad, steamboat or other public conveyance.

“ SEC. 3. It shall be the duty of the owner or owners, operator or operators, of every railroad, steamboat, or other public conveyance of passengers for hire or reward, to provide at each agency, for the sale of tickets, for the redemption of the whole of any ticket or any part or parts, or coupon of any ticket, which they may have sold, and which the purchaser, for any reason, shall not have used, at the following rates, namely: where the whole ticket is presented for redemption, at the full price paid for the same, and when a part or coupon of the ticket only is presented for redemption, then the redemption shall be at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the part of said ticket was actually used; and the sale, by any person, of the unused portion of any ticket, otherwise than by the presentation of the same for redemption as aforesaid, shall be deemed to be a misdemeanor, and shall be punished by a fine of not less than five dollars, nor more than fifty dollars: *Provided, however,* That this act shall not prohibit any person who shall have purchased a ticket from an agent, authorized, as by this act provided, with the *bona fide* intention of travelling on the same, from selling such ticket, or any part or coupon

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thereof, to any other person, to be used in good faith by such person in travelling over such railroad, or in or upon such steamboat, or other public conveyance.

“SEC. 4. If any owner, operator or manager of any railroad, steamboat or other public conveyance of passengers, or his agent, shall violate any of the provisions of the third section of this act, he shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten, nor more than one hundred dollars.

“SEC. 5. It shall not be lawful for any person, not possessed of the authority mentioned in the second section of this act, and not evidenced as therein provided for, to sell, barter or transfer, within this State, for any consideration whatever, the whole or any part of any ticket or tickets, passes or other evidence of the holder's title to travel on, or be transported in, or over any railroad, steamboat or other public conveyance, whether the same be situated, owned or operated within or without this State, except as provided for in section three.

“SEC. 6. It shall be the duty of every agent who shall be authorized to sell tickets or parts of tickets, or coupons, as is provided for in the second section of this act, or other evidences of the holder's title, to travel on any railroad, or in any steamboat or public conveyance, to keep his certificate of authority posted in a conspicuous place in his office, and also to exhibit the same to any person desirous of purchasing a ticket, or to any officer of the law who may request to see or inspect such certificate of authorization.

“SEC. 7. Any person who shall violate any provisions of either the fifth or sixth sections of this act, shall, upon conviction thereof, be fined not less than ten, nor more than one hundred dollars.

“SEC. 8. The provisions of this act shall not apply to special, half-fare or excursion tickets.”

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It is the settled doctrine of the decisions of this court, that "The legislative authority of this State is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own constitution, by the federal constitution, and by the laws and treaties made under it. This is the power under which the Legislature passes all laws." *Beauchamp v. The State*, 6 Blackf. 299. *Doe v. Douglass*, 8 Blackf. 10; *The Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185. It must appear very clearly, that the legislation is in conflict with some express provision of the constitution, or the statute will be upheld.

It is claimed by the appellant that the statute, above quoted, is in conflict with that provision of the Bill of Rights, which declares that no law shall ever be passed "impairing the obligation of contracts." We fail to see this matter in the light in which the appellant's counsel have presented it. But, if it could be said that the statute did impair the obligation of contracts existing at the time of its passage, the effect would be, as it seems to us, that, as to such existing contracts, the statute would be inoperative and of no effect; while it might be and would be, if no other objection existed, constitutional and valid as to all future contracts. The transaction, on which the indictment in this case was predicated, occurred nearly four years, as alleged, after the passage of the act in question, and it can not be said, we think, that the statute impaired the obligation of any contract in connection with that transaction. This objection to the constitutionality of the statute was not well taken, and can not be sustained, in any view of the question.

The second objection urged by the appellant, to the validity of the statute, under our state constitution, is, that it is in conflict with that section of the Bill of Rights, which declares, that "The General Assembly shall not grant to

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any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

In discussing this objection, the appellant's counsel say of the statute: "It grants to any common carrier the exclusive right to purchase the unused portion of its tickets, and does not, under any circumstances, permit any other person to engage in the purchase thereof, and extends to said carriers immunity from all competition in the purchase and sale of such tickets. It simply is enabling a monopoly to be more exclusive."

We do not think that this is a fair statement of the purport and effect of the statute. It does not grant a right to, but imposes a duty upon, the common carrier of passengers, to purchase the unused portion of its tickets. It does not prevent, but expressly allows, the sale by the *bona fide* holder of such unused portions of tickets to any other person, to be used by such person in good faith in traveling therewith. It prohibits a general brokerage business in the buying and selling of such unused portions of tickets, except under certain well defined restrictions. The provisions of the statute in this regard are manifestly police regulations; and whatever may be said, either for or against the justice or the wisdom of these regulations, it is certain, we think, that, in their enactment, the Legislature did not exceed their legitimate power under our state constitution. It is neither the province nor the duty of the courts to call in question either the policy or the wisdom of any act of legislation. The learned attorneys of the State have stated clearly and explicitly, in their argument of this cause, some of the motives which may possibly have induced the General Assembly to enact the statute now under consideration. Without endorsing in anywise this statement, it may not be improper for us to set it out, in this connection, as a statement of the views of the

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representatives of the State in this prosecution, as to the probable reasons for the enactment of this statute.

Counsel say: "If the Legislature believed that spurious tickets were being put upon the market, by means of brokers, of such kind as to make detection difficult, and in such numbers as to amount to a serious injury to the people or the railroad companies, or if they believed that their offices furnished a market for stolen tickets, and aided employees of the railroads, or other persons, in carrying on a nefarious business, and a business dangerous both to the railroads and their patrons, and if they further believed, that the brokers were of little or no advantage to anybody, then they might well enact such a statute as this, as the best means of correcting an existing evil. And if it seemed wiser to the Legislature to strike directly at the brokers, and make their business unlawful, than to attempt to punish those who stole genuine or issued spurious tickets, they had the same right to take that course, that they have to make a man a criminal, who rents a house for gaming purposes, and thus assists gamblers, who are also criminals, in preying upon society."

In our opinion, the statute under consideration is not open to the second objection urged by the appellant's counsel against its validity, under the provisions of our state constitution.

We pass now to the consideration of the main ground of objection, presented by the appellant's attorneys, to the constitutionality and validity of the statute above quoted, namely, that it is in violation of section 8 of the first article of the constitution of the United States, which provides:

"The Congress shall have power:— * * * *

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In discussing this second objection to the statute under

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consideration, the appellant's counsel lay down the following propositions, with the purpose of establishing the same, in and by their argument:

"I. That the word commerce, as used in this section of the constitution, includes passenger travel, and hence any regulation of passenger travel is a regulation of commerce;

"II. That the power vested in Congress to regulate commerce, as applied to inter-state passenger travel, is exclusive, and that the States have no power whatever to legislate upon this subject, even in the absence of legislation upon the part of Congress;

"III. That, conceding that the right to regulate commerce exists in the States until Congress has exercised its powers in that behalf, Congress has so far exercised that power as to preclude any action on the part of the States.

"IV. That the statute does attempt to regulate passenger travel among the States, and hence is void; and,

"V. That such statute is not a legitimate exercise of the police power which confessedly resides in the several States."

We need not, in this opinion, consider or comment upon any of these propositions of the appellant's counsel, except the fourth and fifth. We do not think that the first three of the five propositions, laid down by counsel, are in any manner involved in the case now before us. We recognize the constitution of the United States, and the acts of Congress pursuant thereto, as the supreme law of the land.

It may be conceded that the word commerce, as used in section 8, above quoted, of the first article of the federal constitution, includes within its scope and meaning inter-state passenger travel; and that the power vested in Congress to regulate commerce, as applied to such travel, is so far exclusive in its character, as that the States may not, by

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any act of legislation, impose burdens upon either the carrier or the passenger, which would obstruct or hinder the free course of travel. Such we understand to be the purport and effect of the decisions of the Supreme Court of the United States, in construing the section above quoted. *Gibbons v. Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Henderson v. The Mayor, etc.*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Railroad Co. v. Husen*, 95 U. S. 465. In these cases the doctrine is firmly maintained, that Congress has the exclusive power to regulate commerce, including inter-state passenger travel; and, in the case last cited, the court defines the term commerce, and what is meant by a regulation of commerce, as follows: "Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it, by legislative authority, is regulation."

From this definition of the term regulation, as applied to commerce, it would seem that a state statute, which placed no obstacle in the way of, and imposed no burden upon, inter-state passenger travel, could not be said to "invade the domain of the national government," and could not, for that reason, be held to be unconstitutional and void. It can not be said, we think, that the statute of this State, above quoted, in any manner impedes, obstructs or casts any burden upon the free course of commerce, in so far as inter-state passenger travel is concerned. The statute imposes certain prescribed duties upon common carriers of passengers and their agents, but the discharge of these duties does not and can not, as it seems to us, obstruct or hinder, or cast any burden upon, the commerce of the country or inter-state passenger travel. The act absolutely prohibits and makes unlawful the sale, barter or transfer, within this State, by any person not authorized thereunto as provided in said act, for any consideration whatever, of the whole or any part of any ticket or

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tickets, passes, or other evidences of the holder's right to travel, etc. That far forth, the provisions of the statute must be regarded, as we have already said, as police regulations, the evident object and purpose of which were to prevent and prohibit a general brokerage business in the purchase and sale of such tickets, etc., and the unused portions thereof. We fail to see that these regulations are obstacles to, or burdens upon, inter-state commerce, in any sense of that term.

In the case of *Railroad Co. v. Husen*, *supra*, the Supreme Court of the United States say :

“ We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. * * * It may also be admitted that the police powers of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace.”

If, in the exercise of its police power, a State enacts certain regulations, which are neither obstacles to, nor burdens upon, inter-state commerce, it can not be said, we think, that such legislation “ invades the domain of legislation which belongs exclusively to the Congress of the United States,” merely because it relates to subjects which, to some extent, are connected with inter-state commerce. For, as we understand the decision of the Supreme Court of the United States in the case last cited, the state legislatures are prohibited, by said section 8 of the first article of the federal constitution, from enacting such regulations only, in relation to inter-state commerce, as would be either obstacles to, or burdens upon, such commerce.

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If this view of the matter under consideration is correct, and we think it is, it follows very clearly that the statute of this State, above quoted, is not "in violation of section 8, article 1, of the constitution of the United States," and is not, therefore, unconstitutional and void.

In the same section of the same article of the constitution of the United States, it is provided, that "The Congress shall have power:— * * * * *

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The power thus given was early exercised, and since has been continuously exercised, by Congress in the enactment, from time to time, of suitable laws, for the purposes indicated. The power thus exercised is just as exclusive, in its origin and nature, as the power to regulate foreign or inter-state commerce. In *Ex parte Robinson*, 2 Bissell, 309, it was held by DAVIS, J., then an eminent and learned justice of the United States Supreme Court presiding in the United States Circuit Court in this district, as follows:

"The property in inventions exists by virtue of the laws of Congress, and no state has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property."

This court adopted and followed the doctrine of the case cited, in *Helm v. The First National Bank of Huntington*, 43 Ind. 167, and in *The Grover & Baker Sewing Machine Co. v. Butler*, 53 Ind. 454.

In the recent case of *Patterson v. Kentucky*, 97 U. S. 501, decided by the Supreme Court of the United States in February, 1879, the exclusive power of Congress to legislate on the subject of property in inventions was claimed by the

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plaintiff in error, and that a statute of Kentucky, which imposed a fine on any one who should sell for certain purposes a certain patented article, possessed of certain qualities, was unconstitutional and void, because it was inconsistent with the federal constitution, and the laws of Congress pursuant thereto. In an able and exhaustive opinion, Mr. Justice HARLAN lays down the doctrine, in that case, that, "obviously," the right of a patentee, under the constitution and laws of the United States, "is not granted or secured, without reference to the general powers which the several states of the Union unquestionably possess, in reference to their purely domestic affairs, whether of internal commerce or of police." The learned judge quotes with approval, and to some extent grounds his opinion upon, the following excerpts from Mr. Cooley's excellent Treatise on Constitutional Limitations, to wit:

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual states, and can not be assumed by the national government. * * * If the power extends only to a just regulation of rights, with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, can not well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities." Page 574.

In the case cited, it was held by the Supreme Court of the United States, that the Kentucky statute was a police regulation within the power of the State, and was not in violation of the constitution and laws of the United States. We have cited the case, in this connection, not because it is directly in point, but because it contains the latest expression we have seen of the views of the Supreme Court

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of the United States upon subjects which are, at least, closely allied to the questions involved in this case. Of course, in so far as the doctrine of the case cited is in conflict with the decisions of this court, in the cases above cited, or any other cases in our Reports, the latter cases must be and are overruled.

In the case at bar, our conclusion is, that the statute of this State, above quoted, is not in conflict with the constitution or laws of the United States, but was a legitimate exercise by the State Legislature of the police powers of the State. Therefore, we hold that no error was committed by the court below, in overruling the appellant's motion to quash the indictment.

No point is presented for decision, by the appellant's counsel in argument, arising under the alleged error of the court in overruling the appellant's motion for a new trial. That error, even if it existed, must therefore be regarded as waived.

The judgment is affirmed, at the appellant's costs.

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165	152

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CHANGE OF VENUE FROM JUDGE.—*Appointment of Judge Pro Tempore.*—*Constitutional Law.*—*Criminal Law.*—The act of March 7th, 1877, Acts 1877, Reg. Sess., p. 28, in so far as it authorizes the judge of a court, on a change of venue from him, to appoint a judge *pro tempore*, is constitutional.

CRIMINAL LAW.—*Compelling State to Elect.*—*Judicial Discretion.*—*Supreme Court.*—The discretion of a court, in compelling the prosecuting attorney to elect upon which of several counts of an indictment he will try the defendant, is to be exercised in accordance with enlightened views and judicial precedents; and, unless such discretion is abused, the decision of that court will not be revised by the Supreme Court.

SAME.—*Harmless Error.*—Where, under the counts upon which the pros-

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ecuting attorney elects to try the defendant, evidence of the facts charged in the other counts is admissible, error in compelling such election is harmless..

SAME.—Formal Averments of Indictment.—Where the record of the cause sufficiently shows, and the first count of the indictment sufficiently alleges, the merely formal facts of the finding and return of the indictment into the proper court by the proper grand jury, while the remaining counts merely allege, as to such formal matters, that “the grand jurors aforesaid, upon their oaths aforesaid, do further present,” etc., the fact that the prosecuting attorney elects to abandon the first count does not render the other counts bad for want of such formal averments.

SAME.—Forgery of Certificate of Acknowledgment of Conveyance.—An indictment predicated upon the alleged forging and uttering of a certificate of acknowledgment of the execution of a deed conveying certain lands, with intent to defraud the owner of the land or his heirs, assumes the validity of the conveyance itself, as between the grantor and grantee, and is insufficient. On this point BIDDLE, J., dissents.

From the Switzerland Circuit Court.

T. W. Woollen, Attorney General, *J. O. Cravens*, Prosecuting Attorney, and *J. B. McCrellis*, for the State.

S. Carter, *W. R. Johnston*, *J. A. Works* and *J. D. Works*, for appellee.

BIDDLE, J.—The indictment in this case contains nine counts, variously charging the appellee with forgery in making and uttering a deed conveying certain lands, and with forging and uttering the certificate of acknowledgment by a justice of the peace, appended thereto.

A change of venue was prayed for by the appellee from, and granted by, the presiding judge, who appointed John D. Haynes as judge *pro tempore*, to try the case.

On motion of the appellee, the State’s attorney was then required to elect on which of the counts in the indictment he would go to trial. Under this requirement, he elected to try the appellee on the third, fourth, seventh and ninth counts.

The appellee next moved to quash the several counts in the indictment, which motion was sustained as to each

of the counts on which the prosecuting attorney had elected to put the appellee upon trial.

To each of these rulings the State reserved exceptions, and appealed, and has assigned errors in this court accordingly.

1. The appellant makes no objection to the sufficiency of the affidavit for a change of venue, nor to the mode of appointing the judge *pro tempore*, nor to his qualifications; but insists, that there is no valid law under which such an appointment could be made, for want of constitutional power in the Legislature to enact it. Acts 1877, Reg. Sess., p. 28.

The constitutionality of such a law was disputed in the case of *Starry v. Winning*, 7 Ind. 311, and settled in its favor.

Since that decision, such appointments have been so frequently and uniformly upheld by this court, that we do not deem it necessary to cite the cases.

2. It is insisted, at length and with ability, on behalf of the appellant, that the court erred in requiring the prosecuting attorney to elect on which counts of the indictment he would go to trial.

This power is generally discretionary in the court, to be exercised of course according to enlightened views and judicial precedents, and, unless clearly exceeded, will not be revised by a court of error.

In this case we have carefully examined each count of the indictment, and can find nothing charged in the first, second, fifth, sixth and eighth counts, which is not charged in the third, fourth, seventh and ninth counts, upon which the prosecutor elected to try the case. It is plain, therefore, that the State has not been injured by the ruling complained of. This view will excuse us from an elaborate examination of the question as to when a court may not compel a prosecuting attorney to elect upon which

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count he will proceed to trial; but the following authorities may be consulted: *McGregg v. The State*, 4 Blackf. 101; *Engleman v. The State*, 2 Ind. 91; *McGregor v. The State*, 16 Ind. 9; *Griffith v. The State*, 36 Ind. 406; *Mershon v. The State*, 51 Ind. 14; *Miller v. The State*, 51 Ind. 405; *Wall v. The State*, 51 Ind. 453; *Kidder v. The State*, 58 Ind. 68.

3. The record in this case shows the return of the *venire*, the empanelling of the grand jury, the charge of the judge, the return of the indictment into open court, its filing, etc. Indeed, it appears that all, even the directory, steps of the statute have been complied with.

The first count in the indictment recites, that "The grand jurors of Switzerland county, in the State of Indiana, good and lawful men, duly and legally empanelled, charged and sworn to enquire into felonies and certain misdemeanors, in and for the body of said county of Switzerland, in the name and by the authority of the State of Indiana, on their oaths, present, that one Perret Dufour," etc.

The third count of the indictment is as follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said Perret Dufour, on the 25th day of April, A. D. 1876, at the county of Switzerland in the State of Indiana, did then and there unlawfully, feloniously and falsely forge and counterfeit a certain deed for the conveyance of land of Abner Clarkson which said forged and counterfeit deed of Abner Clarkson, for the conveyance of land is as follows, to wit:" Here the deed is set out in full. The indictment then concludes with the following averment: "With intent to defraud said Abner Clarkson, Charles A. Clarkson and Mary Scaudrett." In this count the deed is set out alone, without the certificate of acknowledgment of the justice of the peace.

The fourth count is for uttering and publishing the deed,

with the same intent, well knowing the same to be false, forged and counterfeit, setting out the deed and certificate of acknowledgment of the justice.

The third and fourth counts allege the crime to have been committed on the 25th day of April, 1876.

The indictment was returned into court, by the grand jury, on the 6th day of April, 1877.

The seventh count is for forging the certificate of acknowledgment to the deed, purporting to be made by William A. Neal, a justice of the peace, and sets out both the deed and certificate of acknowledgment. This count alleges the crime to have been committed on the 15th day of September, 1873, with the intent "to defraud Charles A. Clarkson and Mary E. Scaudrett, two of the rightful heirs of Abner Clarkson, deceased," and concludes with the following averment: "That said Perret Dufour concealed said crime until the 25th day of April, 1875, by keeping said certificate in his possession, contrary," etc.

The ninth count charges forgery, committed on the 25th day of April, 1876, by uttering and publishing the forged certificate of acknowledgment, well knowing the same to be such, and sets out the deed, the certificate of acknowledgment, and the certificate of the clerk of the court, under his seal, as to the official character of the justice of the peace who took the acknowledgment, and then, in a long and formal averment, alleges that the appellee sent the deed to the recorder of White county, wherein the land lies, and caused it to be recorded in the record of deeds in that county, with intent to defraud Abner Clarkson, Charles A. Clarkson and Mary E. Scaudrett, contrary, etc.

The crime is alleged in the fourth, seventh and ninth counts in essentially the same words as in the third count, varying only as to the instrument alleged to have been forged, and as to whether the forgery was committed by making or uttering the instrument.

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We have not been favored with a brief on behalf of the appellee, and from him have no information of the ground upon which the third, fourth, seventh and ninth counts of the indictment were quashed; but we learn inferentially, from the appellant's brief, that the court, acting upon the rule that each count of an indictment must allege an offence independently of any other count, held, that, as the prosecuting attorney had been compelled to elect, and had elected, to try the cause on the third, fourth, seventh and ninth counts of the indictment, and as it did not appear in either of those counts that the indictment was found by a grand jury of Switzerland county, they were therefore insufficient.

We can not hold this objection good. The rule that each count of an indictment must be good, independently of any other count, refers only to the substantial charge of the offence. As to the mere formal parts of the indictment, when they have been once stated in the first count, it will be sufficient to refer to them in the subsequent counts.

The record in this case shows that a legal grand jury of Switzerland county presented the indictment, and duly returned it into open court. The first count of the indictment fully recites these facts, and each of the third, fourth, seventh and ninth counts refers to the grand jurors as "the grand jurors aforesaid, upon their oaths aforesaid, do further present," etc. This is sufficient. 2 R. S. 1876, pp. 385, 386, secs. 60, 61; *Cronkhite v. The State*, 11 Ind. 307; *Snodgrass v. The State*, 13 Ind. 292; *Joy v. The State*, 14 Ind. 139; *Stone v. The State*, 30 Ind. 115; *Bailey v. The State*, 39 Ind. 438; *Lovell v. The State*, 45 Ind. 550; *Dorman v. The State*, 56 Ind. 454.

We can discover no defect in the third and fourth counts of the indictment, for which either should be quashed.

Neither the seventh nor the ninth count contains any averment, that the deed, to which the acknowledgment referred, was a forgery. It must therefore be presumed, that the deed was valid; and, being valid, we can not perceive how the maker of the deed, or his heirs, could be defrauded by the forged acknowledgment. If valid, the deed was good between the vendor and the vendee, without acknowledgment; and, being good, the forged acknowledgment could not make it either better or worse. The only effect of a valid acknowledgment is, to authorize the grantee to put the deed upon record, and to make it an instrument of evidence, without any other proof of its execution, thus preventing the grantor from selling and conveying the land to an innocent purchaser, without notice, and facilitating the grantee in asserting his title—of which, we think, the grantor would have no right to complain.

We are of the opinion, that the seventh and ninth counts in the indictment, for these reasons, are insufficient, and were properly quashed.

The writer of this opinion feels constrained, however, to dissent from his brother judges, in holding that the seventh and ninth counts of the indictment are insufficient.

He thinks an acknowledgment to a deed, by rendering it admissible to the public records and making it an instrument of evidence without other proof of its execution, changes its legal effect, to the disadvantage of the maker, and thereby might defraud him. It might be, indeed, that, by an agreement between the vendor and vendee, the deed was not to be acknowledged or recorded; in such a case the acknowledgment would impose an obligation upon the vendor which he never undertook to perform. Nor can the writer see how an averment in the indictment, that the deed was a forgery, could be necessary to the crime of forging the certificate of acknowledgment.

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Indeed, it seems to him, that an averment that the deed was forged would destroy the validity of the indictment for forging the certificate of acknowledgment; for, if the deed is a forgery, he can not see how forging a certificate of acknowledgment to it could possibly defraud the maker. Nor, according to the opinion of a majority of the court, can he conceive how forgery could be committed in falsely making an acknowledgment to a deed, when the intent was to defraud the maker.

Perhaps an indictment might be good in such a case, if the averment was, with the intent to defraud the person whose name was signed to the acknowledgment, and before whom it was taken.

The judgment is reversed, and the cause remanded, with instructions to overrule the motion to quash the third and fourth counts of the indictment, and for further proceedings.

Opinion filed at May term, 1878.

Petition for a rehearing overruled at November term, 1878.

MITCHELL v. THE STATE.

LIQUOR LAW.—Criminal Law.—Idem Sonans.—Proof of an unlawful sale of intoxicating liquor to one "*Hairholts*" will not support an indictment charging an unlawful sale to one "*Hairholser*."

SAME.—Sale for Medicinal Purposes.—The question as to whether or not a sale of intoxicating liquor was made for medicinal purposes, is one for the jury trying the case.

From the Huntington Circuit Court.

L. P. Milligan, A. Moore, J. T. Alexander and — Hatfield, for appellant.

T. W. Woollen, Attorney General, for the State.

PERKINS, J.—Indictment against James Mitchell, for retailing without license.

The charge in the indictment is, that he, on, etc., at, etc., “did then and there unlawfully sell one gill of intoxicating liquor to one John Hairholser, for the price of ten cents,” said Mitchell not being licensed, etc.

The defendant was arraigned, pleaded not guilty, was tried by a jury, and convicted.

A motion for a new trial was denied, and a fine imposed upon the defendant.

The motion for a new trial was as follows:

“Defendant moves the court for a new trial in the above entitled cause:

“1. Because the verdict of the jury is not sustained by sufficient evidence; and,

“2. Because the verdict of the jury is contrary to law.”

The assignment of errors we copy:

“1. The court erred in overruling the appellant’s motion for a new trial.

“2. The record fails to show that the indictment in said cause was returned into open court, of the proper court and county.”

There is nothing in the second assignment of error. The record shows that the grand jury of the county, on the 21st day of March, being the fourth day of the March term, 1878, of the Huntington Circuit Court, while the court was in open session, returned the indictment in this case, and that, immediately upon its return, the defendant was arraigned upon it, pleaded not guilty, and was tried and convicted.

The first error is well assigned. The motion for a new trial should have been sustained.

On the trial upon this indictment, it was necessary to a conviction, that it should be proved that the defendant sold liquor, illegally, to John Hairholser. *Wreidt v. The State*, 48 Ind. 579.

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If there was proof of such sale to any particular person, in this case, that person was John Hairholts. These names are not *idem sonans*, and do not indicate the same person. Bicknell Crim. Prac. 152; *Mitchell v. The State*, ante, p. 276.

It is claimed that the sale was for medicinal purposes. On another trial, this will present a question for the jury. *Donnell v. The State*, 2 Ind. 658; *Leppert v. The State*, 7 Ind. 300; *Thomasson v. The State*, 15 Ind. 449; *Jakes v. The State*, 42 Ind. 473.

The judgment is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

 GILCHRIST v. GOUGH ET AL.

MORTGAGE.—Purchaser for Valuable Consideration.—Pre-existing Debt.—

Extension of Payment.—One who obtains the execution of a mortgage to secure the payment of a pre-existing debt, in consideration of an extension thereby made of the time of payment, is a purchaser for a valuable consideration.

SAME.—Mortgage Recorded after Time.—Notice.—Though a mortgage be not recorded until after the time prescribed by law, yet the record thereof is notice to all purchasers or encumbrancers subsequent to the recording.

SAME.—Extent of Notice.—Such record is notice of its own contents, and of the existence of the mortgage of which it purports to be a record, but not of the contents of such mortgage.

SAME.—Entry Book.—Case Overruled.—The entry book kept by the recorder pursuant to section 29 of the act concerning the alienation of real property, etc., 1 R. S. 1876, p. 367, is notice of the exact time of reception, the names of the grantor and grantee, the description of the lands conveyed, the date and existence, but not of the contents, of a mortgage or other conveyance which has been entered therein and recorded. *Kessler v. The State, ex rel., etc.*, 24 Ind. 813, overruled.

SAME.—Index.—The index of mortgages and other conveyances, kept by the recorder pursuant to section 3 of the act prescribing his duties, etc., 1 R. S. 1876, p. 758, is not notice of the amount of the consideration of any such instrument, even though the index specify such amount.

63	576
126	311
126	315
63	576
142	238
63	576
145	604
63	576
148	95
63	576
157	681
63	576
160	3
160	158
63	576
171	346

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SAME.—Mistake of Record, as to Amount of Debt.—Priorities.—A mortgage on real estate was so entered in the entry book, and also indexed, as to show the true amount of the mortgage debt, but by a mistake in recording, made without the knowledge of the mortgagee, the record showed the amount of such debt to be much less than it really was. Subsequently the same land was mortgaged to one who had no actual knowledge of the existence of the prior mortgage.

Held, in an action for the foreclosure of the first mortgage, against the mortgagee of the second mortgage, that, except as to the amount of the first mortgage debt shown by the record, the second mortgage has priority over the first.

From the Henry Circuit Court.

J. C. McIntosh, M. E. Forkner and E. H. Bundy, for appellant.

J. Brown, S. H. Buskirk and J. W. Nichol, for appellees.

Howk, C. J.—This was a suit by the appellant, as plaintiff, against the appellees, as defendants, for the foreclosure of a certain mortgage, and the recovery of the mortgage debt.

In his complaint, the appellant alleged, in substance, that, on the 1st day of March, 1869, the appellees Charles T. Gough and Mary C. Gough, his wife, conveyed, mortgaged and warranted unto the appellant certain real estate, particularly described, in Henry county, Indiana, containing one hundred and ten acres; that the said mortgage was duly recorded in the recorder's office of said Henry county, on the 15th day of May, 1871, and was filed with and made part of said complaint; that the mortgage was given to secure the payment of a debt evidenced by a note of even date therewith, for five thousand dollars, executed by the appellee Charles T. Gough, and payable to the appellant three years after the date thereof, with interest at the rate of nine per centum per annum; that the said note and mortgage were executed to the appellant in consideration of five thousand dollars on that day loaned by him to said Charles T. Gough, and for no other consideration; that, on

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the 1st day of March, 1872, the appellee Charles T. Gough executed to the appellant his certain other note of that date, whereby he promised to pay the appellant the sum of one thousand four hundred and seventy-five dollars, three months after date, with interest at the rate of nine per cent. per annum until paid, both of which said notes were filed with and made parts of said complaint; that the last described note was given for the accrued interest on the note first described, and for no other or different consideration, and was but another evidence of a part of the debt evidenced by said first described note and secured by said mortgage; that there was due the appellant, on the said debt secured by said mortgage and evidenced by said notes, the sum of eight thousand dollars, which was wholly unpaid; that, on the 14th day of February, 1874, the said Charles T. Gough and his said wife conveyed and mortgaged the said property to the appellee Jacob V. Hoffman, to secure a debt evidenced by a note of that date, due in twelve months from the date thereof, payable to the order of said Hoffman, for three thousand five hundred dollars, with ten per cent. interest from date; that, on the 10th day of July, 1874, the said Gough and his said wife again conveyed and mortgaged the said real estate to the said Hoffman, to secure a debt evidenced by a note of that date, for one thousand dollars, executed by said Charles T. Gough, and payable to said Hoffman in one year after the date thereof; and that, on the — day of March, 1875, the said Charles T. Gough made and executed to the appellees Elisha Clift and John Kepler a general assignment of all his property for the benefit of his creditors, in which assignment the said mortgaged real estate was assigned and transferred by him to them, for the benefit of his creditors; that, at the time said assignment was made, the said Charles T. Gough was in embarrassed and failing circumstances, and that the said Clift and Kepler have qualified, as re-

quired by law, and entered upon the discharge of the duties of their trust as such assignees. Wherefore, etc.

All the defendants to the action, except said Jacob V. Hoffman, made default. Hoffman appeared, and answered in three paragraphs, the first setting up affirmative defences to the appellant's cause of action, the third paragraph of said answer being in the nature of a counter-claim, or cross complaint as it is called, against the appellant and the codefendants of said Hoffman, and the second paragraph being a general denial.

The appellant demurred to the first and third paragraphs of the answer, upon the ground, as to each paragraph, that it did not state facts sufficient to constitute a defence to the appellant's cause of action. The appellant also demurred to said Hoffman's cross complaint, upon the ground that it did not state facts sufficient to constitute a cause of action against the appellant. Which demurrers were severally overruled as to the first and third paragraphs of answer, and as to said Hoffman's cross complaint, to which decisions of the court the appellant excepted.

The appellant replied, in four paragraphs, to the first and third paragraphs of the answer of the appellee Hoffman, and to his cross complaint. The first, third and fourth of these replies set up affirmative matters, and to each of these replies the appellee Hoffman demurred for the alleged insufficiency of the facts therein to constitute a reply to the said paragraphs of his answer and his cross complaint, which demurrers were sustained by the court as to the first and fourth replies, and to these decisions the appellant excepted.

The second reply was a general denial.

The demurrer of the appellee Hoffman to the third reply and answer to the cross complaint was overruled, and said Hoffman then replied thereto by a general denial.

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The issues joined were tried by a jury, and a verdict was returned, as follows :

“ We, the jury, find for the plaintiff ” (the appellant), “ against the defendants Gough and Gough and Kepler and Clift, and assess his damages at \$7,958.75.

“ We, the jury, further find for the defendant Hoffman, as against the defendants Gough and Gough and Kepler and Clift, and assess his damages at \$5,868.53.

“ We, the jury, further find, as to the issues joined between the plaintiff and defendant Hoffman, for the defendant Hoffman.”

The appellant’s motion for a new trial was overruled, and to this ruling he excepted, and judgment was rendered upon and in accordance with the verdict of the jury, from which judgment this appeal is now prosecuted.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court :

1. In overruling his demurrer to the first paragraph of the answer of the appellee Hoffman ;
2. In overruling his demurrer to the third paragraph of said answer ;
3. In overruling his demurrer to the cross complaint of said Hoffman ;
4. In sustaining said Hoffman’s demurrer “ to the first and third [fourth ?] paragraphs ” of the appellant’s reply, and in sustaining said demurrer “ to the first and third [fourth ?] paragraphs ” of the appellant’s answer to said Hoffman’s cross complaint ; and,
5. In overruling the appellant’s motion for a new trial.

As necessary to a proper understanding of this cause, and of the important and controlling questions therein, and of our decision of those questions, we will first give a summary of the facts of the case, as we gather the same from the record. On the 1st day of March, 1869, the de-

fendants Charles T. Gough and Mary C., his wife, executed to the appellant the mortgage described in his complaint in this action, conveying to him the real estate in Henry county, particularly described in said mortgage, as security for the payment of a debt of five thousand dollars, evidenced by the promissory note of said Charles T. Gough, of even date with said mortgage, payable three years after its date, to the appellant, with interest thereon at the rate of nine per centum per annum. The consideration of said note and mortgage was the loan of five thousand dollars, by the appellant, to said Charles T. Gough.

On the 15th day of May, 1871, the appellant left the said mortgage for record, with the recorder of Henry county, at the recorder's office of said county. The recorder entered the mortgage in the "Entry Book" of his office, in the appropriate columns thereof, showing the exact date and hour the mortgage was left with him, the date and character of the instrument, the names of the grantor and grantee therein, and the book and page, of his office, on which the mortgage was recorded. The mortgage was recorded on the day last named, in the proper mortgage record of the recorder's office of said county; but, in recording the mortgage in this record, the recorder, by mistake or oversight, wrote the words "five hundred dollars," instead of the words "five thousand dollars," which latter words were the words in the original mortgage; so that the record of the mortgage only showed a mortgage to the appellant, from Charles T. Gough and his wife, for five hundred dollars, instead of showing a mortgage for five thousand dollars, as the fact was, which the record of the mortgage ought to have shown. After the mortgage had been thus recorded, the original mortgage was delivered to the appellant, and was by him taken away from the recorder's office, neither he nor the recorder

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having discovered, or having any knowledge of, the mistake which had been made in the record of said mortgage.

In the "Index of Mortgages," in the recorder's office of said county, the mortgage was entered, specifying in a column thereof, provided for that purpose, that said mortgage was for five thousand dollars.

On the 10th day of February, 1874, the said Charles T. Gough and his wife executed a mortgage, conveying to the appellee Jacob V. Hoffman the same real estate described in the appellant's said mortgage, to secure the payment of a debt evidenced by the note of said Charles T. Gough, of even date with said mortgage, for the sum of thirty-five hundred dollars, payable twelve months after the date thereof, to said Jacob V. Hoffman, with ten per cent. interest from date. This mortgage was duly recorded in the recorder's office of said Henry county, on the 9th day of May, 1874.

On the 10th day of July, 1874, the said Gough and his wife executed another mortgage, conveying to the appellee Hoffman the same real estate, as security for the payment of another note, of the same date with said mortgage, executed by said Charles T. Gough, and payable twelve months after date to said Hoffman, with ten per cent. interest from date. This latter mortgage was also recorded in the recorder's office of said county, on the — day of —, 1874.

The consideration of each of the said two notes executed by said Gough to said Hoffman was the prior indebtedness of the former to the latter, for money loaned and goods sold and delivered, to an amount in excess of the aggregate amount of said two notes, and the extension of time or credit given by each of said notes for the payment of the amount thereof.

At the times when the appellee Hoffman took and received his said two mortgages from Gough and his wife,

on said real estate, he had no notice nor knowledge, actual or constructive, of the appellant's prior mortgage thereon, or of the amount of said mortgage, except such as he had obtained, or might have obtained, from the records of the recorder's office of said Henry county.

Upon the foregoing facts, the question presented for decision, in the language of appellant's counsel in their argument of this cause in this court, is "the one single question of the priority of the mortgages." The learned counsel then say: "This question involves three other questions:

"1. Was Hoffman, under the above statement of facts, a *bona fide* purchaser or mortgagee, for value?

"2d. Where a mortgage is properly filed in the recorder's office, and properly entered in the 'entry book,' but is afterward, by mistake, misrecorded without the fault of the mortgagee, does it take priority over a subsequent *bona fide* mortgage, upon a valuable consideration, without notice?

"3d. Was the actual knowledge that the mortgage was indexed as one for \$5,000.00, sufficient to put the subsequent mortgagee on inquiry, and charge him with notice of the mistake in the record and of the true amount of the mortgage?"

We will consider and decide these several questions in the same order in which counsel have numbered them.

1. It is conceded by the appellant's attorneys, that, by the law as stated by this court in the case of *Work v. Brayton*, 5 Ind. 396, the appellee Hoffman was a *bona fide* purchaser or mortgagee for value, and we are asked to reconsider the doctrine of that case, that a mortgage of real estate, given to secure a precedent debt, is founded upon a valuable consideration. Upon this point, the case cited has been approved by this court in a number of more recent decisions. *Nutter v. Harris*, 9 Ind. 88; *Wright v.*

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Bundy, 11 Ind. 898; *McMahan v. Morrison*, 16 Ind. 172; *Babcock v. Jordan*, 24 Ind. 14; and *Brannon v. May*, 42 Ind. 92.

On the point now under consideration, the cases cited have never been expressly overruled; but the doctrine of those cases was modified by this court, in the later case of *Busenbarke v. Ramey*, 53 Ind. 499, to such an extent as to virtually overrule the previous cases. In the case last cited, it was held, in substance, and we think correctly, that the mortgagee who takes a mortgage to secure a pre-existing debt, the time of payment not being extended, or no securities being surrendered, or nothing of value being parted with, is not a purchaser for a valuable consideration, within the meaning of that expression as used in the law. In support of this doctrine, in addition to the authorities cited in the case of *Busenbarke v. Ramey*, *supra*, we cite the following: 2 White & Tudor's Leading Cases in Equity, part 1, p. 83, *et seq.*; *Johnson v. Graves*, 27 Ark. 557; *Ashton's Appeal*, 73 Pa. State, 153; and *Cary v. White*, 52 N. Y. 138, 141.

It will be readily seen, however, from our statement of the facts of this case, that, under the law as we have stated it, the appellee Hoffman must be regarded as a purchaser or mortgagee, for a valuable consideration, as to each of his said mortgages. For it appeared that, in each of said mortgages, the time of payment of the pre-existing indebtedness, to secure which the mortgage was given, had been extended for the term of one year, and this extension of time, as we have seen, was sufficient to make him a purchaser or mortgagee for a valuable consideration, as to each of the mortgages.

2. In section 16 of "An act concerning real property and the alienation thereof," approved May 6th, 1852, it is provided, in substance, that every mortgage or conveyance of land, or of any interest therein, and every lease for more

than three years, shall be recorded in the recorder's office of the county where such land shall be situated; and every conveyance or lease, not so recorded in forty-five days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser, lessee or mortgagee in good faith and for a valuable consideration. 1 R. S. 1876, p. 365. The mortgage to the appellant, described in his complaint, was not recorded in the recorder's office of Henry county, until long after the expiration of the time, then ninety days, within which the statute required that it should be recorded. It has been repeatedly decided by this court, however, that the record of a conveyance, not recorded within the period of time limited by the statute, but after the expiration of that time, would constitute notice to all purchasers after the conveyance had been placed upon record. *Meni v. Rathbone*, 21 Ind. 454; *Runyan v. McClellan*, 24 Ind. 165; *Trisler v. Trisler*, 38 Ind. 282; *Brannon v. May*, 42 Ind. 92.

It will be seen from our statement of the facts of this case, that the appellant's mortgage was recorded in the proper recorder's office, more than two years before either of the two mortgages held by the appellee Hoffman had been executed. It is not questioned, therefore, that the record of the appellant's mortgage constituted notice to the appellee Hoffman, at the time he took his said two mortgages on the same real estate covered by the appellant's mortgage. Such record of said mortgage, however, was only notice, whether actual or constructive, of the existence and record of the mortgage and of the contents of such record. This proposition is so manifestly true and correct, that the appellant's counsel, as we understand them, do not call it in question. It is claimed, however, as will be seen from the second question, above set out, of the appellant's attorneys, that, where a mortgage has been properly filed for record in the recorder's office, and properly entered in

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the "entry book" of said office, but has been afterward, by mistake, erroneously recorded, without any fault of the mortgagee, such mortgage would take priority over a subsequent *bona fide* mortgage upon a valuable consideration, without notice.

It seems to us that the second question, as stated by counsel, does not accurately present the precise point intended to be presented thereby. The position of the appellant's attorneys on the point under consideration, if we correctly understand them, is this: Where a mortgage has been properly filed for record, and properly entered in the "entry book" of the proper recorder's office, and afterward, by mistake and without any fault of the mortgagee, has been erroneously recorded, every subsequent *bona fide* purchaser or mortgagee, for a valuable consideration, is affected by law with notice of the actual contents of the mortgage itself, without regard to the contents of the record of the mortgage. In support of this position, counsel rely upon the provisions of section 29 of the act before referred to, concerning real property and the alienation thereof, which section reads as follows:

"SEC. 29. Every recorder of deeds shall keep a book, each page of which shall be divided into five columns, headed as follows, to wit:

DATE OF RECEPTION.	NAMES OF GRANTORS.	NAMES OF GRANTEES.	DESCRIPTION OF LANDS.	VOLUME AND PAGE WHERE RECORDED.
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"And the recorder shall enter in said book, all deeds and other instruments left with him to be recorded; noting in the first column the day and hour of receiving such deed or instrument, and the other particulars in the appropriate column; and every such deed or instrument shall be deemed as recorded at the time so noted." 1 R. S. 1876, p. 367.

It seems to us, that this section of the statute does not sustain the position of the appellant's attorneys, as we understand their position. It is true, that, under this section, every deed or instrument left with the proper recorder for record, "shall be deemed as recorded" at the day and hour the recorder shall enter the same in the "entry book" of such recorder's office. The record made in this "entry book," under the law, is notice only of those matters which the statute requires shall be entered in the different columns of said book. It is not, and was not intended to be, notice of any act, matter or thing of which the statute does not, in express terms, require an entry to be made in the appropriate column of said "entry book." The entries there made of the matters specified in the statute are notice of those matters, and no others, to all parties interested. They are notice of the existence of the deed or other instrument, of the exact date of its reception for record, of the parties thereto, grantors and grantees, and of the description of the lands to be affected thereby; but the fact, that an entry must also be made of the volume and page where such deed or other instrument will be found of record, shows very clearly, we think, that it never was intended that these entries in the "entry book" should be notice of the contents of such deed or instrument.

The appellant's counsel, in support of their position, have cited the case of *Kessler v. The State, ex rel., etc.*, 24 Ind. 313. That was a suit on the official bond of Kessler, the recorder of Tipton county, to recover damages for an alleged failure to discharge his official duty. The breach assigned was, that the recorder had wholly failed to record a certain chattel mortgage, which had been left with him for record, by means whereof the mortgagee had lost his mortgage debt. The appellee's relator had judgment below, and on appeal to this court, the record showing that the recorder had made the proper entries in relation to said mortgage, in the "en-

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try book " of his office, the judgment was reversed. The decision was founded upon said section 29, before cited, of the act concerning real property and the alienation thereof. The section cited was not applicable to a mortgage of chattels, and the decision of the court in that case can not be sustained. The case cited is overruled.

There is a wide and marked difference, however, between a case where there has been no record made of a mortgage, other than the proper entries in relation thereto, in the "entry book" of the proper office, and the case where, as in the case at bar, the mortgage has been recorded, but, by mistake of the recorder, and without any fault of the mortgagee, it has been erroneously recorded. The former case is not presented by the record of this cause, and we need not and do not decide what would be the effect of the entries in the "entry book" of the appellant's mortgage, if no other record of said mortgage had been made in the proper recorder's office.

In the entries in the "entry book" in the recorder's office of Henry county, in relation to the appellant's mortgage, reference is made, in the appropriate column, to the volume and page where said mortgage was recorded. It was there recorded, by the recorder's mistake and without the appellant's fault, as a mortgage for five hundred dollars, instead of for five thousand dollars as in the original mortgage. There was nothing in the entries in the "entry book," in relation to said mortgage, to indicate that it had been given for any other or different sum than the sum of five hundred dollars, as expressed in the record of said mortgage.

The record of the mortgage alone affected the appellee Hoffman with notice of the mortgage, and of the contents of such record. As to Hoffman, who was, as we have seen, a mortgagee in good faith and for a valuable

consideration, it seems clear to us, that the record of the appellant's mortgage was notice only to the extent of five hundred dollars, the sum expressed in such record, and interest thereon. In support of this conclusion, and for the benefit of those who may wish to examine them, we cite in this connection the following authorities, for which we are indebted to the industry of the learned attorneys of the appellee Hoffman: *Frost v. Beekman*, 1 Johns. Ch. 288; *Beekman v. Frost*, 18 Johns. 544; *The New York Life Ins. Co. v. White*, 17 N. Y. 469; *Jennings v. Wood*, 20 Ohio, 261; *Brown v. Kirkman*, 1 Ohio State, 116; *Sawyer v. Adams*, 8 Vt. 172; *Sanger v. Crague*, 10 Vt. 555; *Luch's Appeal*, 44 Pa. State, 519; *Speer v. Evans*, 47 Pa. State, 141; *Schell v. Stein*, 76 Pa. State, 398; *Miller v. Bradford*, 12 Iowa, 14; *Barney v. McCarty*, 15 Iowa, 510; *Lally v. Holland*, 1 Swan, 396; *Shepherd v. Burkhalter*, 13 Ga. 443; *Chamberlain v. Bell*, 7 Cal. 292; *Barnard v. Campau*, 29 Mich. 162; *Terrell v. Andrew County*, 44 Mo. 309; *Brydon v. Campbell*, 40 Md. 331.

3. The third question, stated by the appellant's counsel as involved in the record of this cause, was this: "Was the actual knowledge that the mortgage was indexed as one for \$5,000.00, sufficient to put the subsequent mortgagee, on inquiry, and charge him with notice of the mistake in the record and of the true amount of the mortgage."

We have two statutes in this State, which provide for indexes to the records of the recorder's office in each county. In section 1 of an act authorizing recorders to make out complete or general indexes, etc., approved February 16th, 1852, it is provided, that "Such index shall be double, giving the name of each grantor and grantee alphabetically, a concise description of the premises, the date of the deed, together with the number or letter of the book, and the page in which each deed is recorded." 1 R. S. 1876, p. 757.

In section 3 of "An act to provide for the election, and prescribing certain duties of recorder," approved May 31st, 1852, it is provided, that the recorder shall make a complete index of all the instruments recorded, for each volume, which should contain "The name of each grantor, promiser or covenantor, in alphabetical order referring to the proper grantee, promisee or covenantee; and also the name of each grantee, promisee or covenantee, in the same order, referring to the proper grantor, promiser or covenantor." 1 R. S. 1876, p. 759.

It will be seen from these provisions, that the recorder is not required by law to note in any indexes the amount of any mortgage recorded in his office. Therefore, it seems to us, that a memorandum of the amount of a mortgage, made by a recorder in any index of his office, is not notice, actual or constructive, of any matter which other persons are bound to take notice of. The object of an index to records is to point out the book and page in which a particular record may be found; and if a person should find that there was a discrepancy or variance between the index to the record and the record itself, as to a matter which the record was obliged to contain, and the index was not required to contain, we think that he might well and reasonably conclude that the record was right and the index was wrong, without any further inquiry. Such discrepancy or variance would certainly not be sufficient to charge a subsequent mortgagee in good faith and for a valuable consideration, with notice that the index was right and the record was wrong, or of the true amount of the mortgage.

What we have hitherto said in this opinion disposes of all the errors assigned by the appellant, which call in question the decisions of the circuit court on the pleadings. There was no error in any of those decisions. The fact, that the appellant's mortgage was entitled to priority over

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the mortgages of the appellee Hoffman, to the extent of the amount shown in and by the record of the appellant's mortgage, was a fact recognized by said appellee in his pleadings, and acted upon by the court in its decisions, both in overruling the appellant's demurrers to the appellee's answers and cross complaint, and in sustaining appellee's demurrers to the appellant's replies.

We think it is unnecessary for us to set out even the substance of any of these pleadings. They were intended to, and did, fairly present the precise questions which have been fully considered in this opinion.

Under the alleged error of the circuit court in overruling the motion for a new trial, the counsel of the appellee Hoffman have briefly discussed in argument several alleged errors of law occurring at the trial, in the introduction of evidence and in giving and refusing to give certain instructions to the jury trying the cause. We have carefully examined and considered each and all of these alleged errors of law, and have been led to the conclusion, that none of them are well assigned, or available to the appellant for a reversal of the judgment below.

After a careful and thorough examination of the record of this action, and upon full consideration of the able and exhaustive briefs of the learned counsel of the respective parties, it has seemed clear to us, "that the merits of the cause have been fairly tried and determined in the court below."

In such a case, the statute forbids that the "judgment be stayed or reversed, in whole or in part." 2 R. S. 1876, p. 246, sec. 580.

The judgment is affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

Joffries v. Rowe.

68	592
128	482
189	302

JEFFRIES v. ROWE.

TOWNSHIP TRUSTEE.—*Eligibility to Office of.—Construction of Statutes.—*

Township Elections.—The act of March 12th, 1877, "limiting the eligibility to the office of township trustee," Acts 1877, Spec. Sess., p. 79, is not in conflict with the act of March 8d, 1877, providing "for township elections," Acts 1877, Reg. Sess., p. 58; and both acts should be construed as though the former act were an additional section of the latter.

SAME.—*Contested Election.*—A township trustee who had held the office of township trustee for two consecutive terms immediately preceding the first Monday of April, 1878, was not eligible to re-election on that day, though his last term had not continued for the two years for which he had been elected.

SAME.—The term "hereafter," as used in said act of March 12th, 1877, refers to and means the time after the taking effect of such act.

From the Posey Circuit Court.

A. P. Hovey, G. V. Menzies and E. M. Spenser, for appellant.

W. P. Edson, H. C. Pitcher and M. W. Pearse, for appellee.

BIDDLE, J.—Proceedings to contest an election to the office of township trustee.

The appellant, who is contestor, filed his written statement against the appellee, who is contestee, before the county auditor, stating the grounds of contest.

After alleging the facts showing his eligibility to hold the office, he avers, that, at the April election, in the year 1878, the contestor and contestee were opposing candidates for the office of township trustee for Black township, in said county; that the contestee at said election received five hundred and ninety-one votes, and the contestor received five hundred and eighty votes; that the inspectors of said election declared the contestee duly elected; that the contestee at the time was ineligible to hold said office, for the reason that he had held the said office in said county and State during two consecutive terms, before the 1st day of April, 1878; that said contestee was duly elected trustee of said township on the 8th day of October, 1872, and was duly quali-

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fied as such trustee, under said election ; that said contestee was duly elected to the same office on the 13th day of October, 1874, and was duly qualified accordingly; that said contestee was again duly elected to said office on the 10th day of October, 1876, and was duly qualified; and that said contestee, since the 21st day of October, 1872, has held, enjoyed and exercised the duties of said office of trustee of said Black township, up to the filing of this statement, and still holds and claims said office by virtue of said election so held on the 1st day of April, 1878.

Prayer that the contestor be declared duly elected to said office, and that the same be certified accordingly.

Before the board of commissioners, the contestee filed his demurrer to the statement of the contestor, upon the ground of the insufficiency of the facts stated to constitute a cause of contest, which demurrer was overruled. The contestee declined to answer further, and the board of commissioners adjudged that the contestor was duly elected to said office, and was entitled to his certificate of election as such trustee.

From this judgment the contestee appealed to the circuit court, wherein the demurrer was sustained, and the contestee adjudged duly elected to said office, and that a certificate of his election be issued accordingly; to all of which the contestor excepted, and appealed to this court.

The eligibility of the contestee to hold the office in contest depends on the construction of the acts of March 8d, 1877, and March 12th, 1877. Acts 1877, Reg. Sess., p. 58, and Spec. Sess., p. 79.

Section 1 of the act of March 12th is in the following words:

“That any person who has held the office of trustee of any township in this State for two terms consecutively, at the date of the next general election in October, 1878, shall not be eligible to said office for the next ensuing

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term, and that hereafter no person shall be eligible to the office of township trustee, more than four years in any period of six years." Acts 1877, Spec. Sess., p. 79.

Township trustees are not created by the constitution. They are the creatures of the law. Constitution, art. 6, sec. 3.

Offices created by the Legislature may be abolished by the Legislature. The power that creates can destroy. The creator is greater than the creature. The term of an office may be shortened, the duties of the office increased, and the compensation lessened, by the legislative will. *Gilbert v. The Board of Commissioners, etc.*, 8 Blackf. 81; *Ellis v. The State*, 4 Ind. 1; *Walker v. Dunham*, 17 Ind. 483; *Walker v. Peelle*, 18 Ind. 264.

By these principles and authorities, the question before us must be tested.

Statutes are generally to be construed prospectively, but they may have a retrospective effect, when the legislation plainly intends they should, and no vested rights are disturbed thereby.

But the statute before us has no retrospective effect, when applied to the agreed statement of facts. It acts upon facts in existence at the time it went into effect. The plain meaning of it is, that any person who had, at the date of the general election in October, 1878, held the office of township trustee two consecutive terms, immediately before, should not be eligible to hold the office the next ensuing term. The fact, that the time of holding the election for township trustees had been changed from the month of October to the month of April, can make no difference; and the fact, that the contestee was eligible to hold the office at the time he was elected, will not authorize him to hold it after he became ineligible, although it shortened his official term. Offices are neither grants nor contracts nor obligations which

can not be changed or impaired. They are subject to the legislative will at all times, except so far as the constitution may protect them from interference. *Coffin v. The State*, 7 Ind. 157.

The appellee makes three propositions in his brief:

“1st. The causes necessary to create the ineligibility prescribed in the first clause of the act of March 12th, 1877, have no application to the terms of office previously held by the appellee;

“2d. If the causes necessary to create such ineligibility apply to the terms of office previously held by the appellee, such ineligibility, itself, has no application to the term of office in contest;

“3d. If the two acts, of March 3d and March 12th, 1877, are not construed *in pari materia*, so as to render all their provisions valid in accordance with either our first or second propositions, such acts are inconsistent with each other, and one of them must necessarily be held inoperative, in some of its provisions; and, in order to reconcile that inconsistency, the first clause of the latter act, providing for an impossible event in the future, as well as being retrospective in its character, should be held null and void.”

The affirmative of these propositions is ingeniously supported by the counsel for the appellee, in an elaborate argument.

To answer the third proposition:

1st. We do construe the acts of March 3d and March 12th as one act, the same as if the latter was inserted as a section in the former act. But we can perceive no conflict between them. The former act provides for the election of township officers, amongst them a township trustee, on the first Monday in April, 1878, and every second year thereafter, and provides that the certificate of the board of judges “shall entitle the holder to qualify and en-

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ter upon the discharge of the duties of the office to which he is elected, at the expiration of ten days from the day of such election," etc. The latter act simply declares who shall not be eligible to the office of township trustee, namely, that any person who has held the office of trustee of any township in this State for two terms consecutively, at the date of the next general election in October, 1878, shall not be eligible to said office for the next ensuing term; and that "hereafter no person shall be eligible to the office of township trustee, more than four years in any period of six years." The latter act repeals nothing in the former act, and is not inconsistent with it, but simply adds to it. The words, "such certificate shall entitle the holder to qualify and enter upon the discharge of the duties of the office to which he is elected," as used in the former act, can not be held to mean that he shall so qualify, and enter upon the duties of his office, if he is ineligible; and where the latter act declares what shall render a township trustee ineligible, the two acts considered together render their construction plain, namely, that the certificate of election shall entitle the holder who is eligible to the office of township trustee, according to the latter act, to qualify and enter upon the discharge of the duties of his office; and the right to qualify and enter upon the duties of his office can not be held to mean that he can hold the office after he becomes ineligible.

The affirmative of the first and second propositions would appear plausible, if it were not for the latter clause of the act of March 12th, 1877, which declares, that "hereafter no person shall be eligible to the office of township trustee, more than four years in any period of six years." The word "hereafter" means after the law went into force, which was before the general election in October, in the year 1878.

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To give the construction to the two acts contended for by the appellee would be to allow the contestee to hold the office more than four years in a period of six years, directly against the words and the plain sense of the statute.

The appellee also contends, that, if the contestee was eligible to hold the office at the time he was elected, he was eligible to hold the office for the whole term of two years, "because the act of March 3d, 1877, expressly required said term to be for the full period of two years, commencing April, 1878, and ending April, 1880." This would be true, if it were not for the act of March 12th, 1877, which, as contended for by the appellee, must be construed with the act of March 3d, 1877.

The facts agreed upon in the case, as applicable to the act of March 12th, 1877, show that the contestee was not eligible to hold the office, after the general election in October, 1878, any longer than until his successor was elected and qualified. The term eligible means, not only eligible to be elected to the office, but also eligible to hold it after the election; and an officer may be eligible at the time of his election, and for a period afterwards, yet not be eligible to hold the office during its entire legal term.

In the case of *Carson v. McPhetridge*, 15 Ind. 827, which was a contest for the clerk's office of the Monroe Circuit Court, it was well said by PERKINS, J., who delivered the opinion of the court:

"The fact that the effect of this construction will be to terminate the holding of a portion of the first occupants, under the new constitution. in the middle of a term, we do not think is entitled to much weight. It produces no greater inconvenience than death, removal, or resignation is frequently doing, and is as well provided for as such cases are. Suppose the constitution rendered a person ineligible to hold an office, after he had arrived at a certain

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age, say sixty years, he might be elected at fifty-nine, and serve a year, and then be compelled to vacate his office."

According to the previous decisions of this court, the contestee being ineligible after the general election in 1878, the contestor is entitled to the office. *Gulick v. New*, 14 Ind. 93; *Beal v. Ray*, 17 Ind. 554; *Price v. Baker*, 41 Ind. 572.

The judgment is reversed, at the costs of the contestee, and the cause remanded with instructions to overrule the demurrer to the written statement, and for further proceedings according to this opinion.

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CRIMINAL LAW.—*Alibi*.—*Instruction to Jury*.—An instruction to a jury, which tends to prejudice their minds against evidence introduced by the defendant to establish an alibi, or which tends to cast suspicion upon such defence, is erroneous.

From the Harrison Circuit Court.

B. P. Douglass, S. M. Slockslager, W. F. Jones, S. J. Wright and A. Stephens, for appellant.

T. W. Woollen, Attorney General, for the State.

BIDDLE, J.—The appellant was indicted with two others, for larceny committed in stealing six yards of steel mixed Jeans, and other goods. He was tried and convicted. By a motion for a new trial he has presented several questions for our decision, among them the following:

At the trial the court instructed the jury as follows:

"7. The defendant has introduced some evidence for the purpose of showing that he could not have been present at the place where the alleged crime was committed, at the

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time it was committed, because of his presence at another place at the time of the commission of the offence.

“This is usually called an *alibi*. This defence is liable to great abuse, growing out of the ease with which it may be fabricated, and the difficulty with which such fabrication can be detected. It often happens, in the recollection of ordinary events, that the day may become to be mistaken for another, as by being confounded with the preceding or following. Thus it has occurred, that the assignment of events, true in themselves, of one day, have been confounded with those of another. The evidence offered upon this subject should be carefully compared with the other evidence given in the cause, and you should ascertain how it corresponds with the account which the accused himself has given of his whereabouts on that day.”

This instruction seems to have been copied from a quotation in the case of *West v. The State*, 48 Ind. 483, under the impression, probably, that it was approved in that case. But upon examination it will be found, that no opinion was expressed upon it, as the judgment was reversed upon another instruction. We are not prepared to approve of this instruction. It seems to us to conflict with what this court has settled upon this question. *French v. The State*, 12 Ind. 670; *Adams v. The State*, 42 Ind. 373; *Binns v. The State*, 46 Ind. 311; *Kaufman v. The State*, 49 Ind. 248; *Howard v. The State*, 50 Ind. 190; *Sater v. The State*, 56 Ind. 378.

It can not be held as a principle of law, that the defence of *alibi* is liable to great abuse, growing out of the ease with which it may be fabricated, and the difficulty of detecting the fabrication. This is not always true of such a defence. Sometimes the evidence which tends to prove an *alibi* is open, clear and direct, without any of the signs of fabrication about it. Sometimes, doubtless, it is open to suspicion. So may evidence be which tends to prove

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any other fact. Law is fixed and uniform; it can not be one thing in one case, and another thing in another case, as evidence may be. We know of no rule of law which attaches a suspicion to, or fixes a blemish upon, evidence tending to prove an *alibi*, any more than it does upon evidence tending to prove any other fact. What creates suspicion against, or marks evidence with a blemish, is a question of fact, and not a rule of law; and as the court must instruct the jury upon questions of law, and not of fact, we think the court erred in giving the instruction complained of.

Other questions need not be decided. .

The judgment is reversed, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings. The clerk will issue the proper order for the return of the prisoner.

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to the plaintiff by a purchaser of the mortgaged property, a failure of the plaintiff to release the mortgage, his subsequent assignment of the same to another, and that said defendant had thereafter purchased the mortgaged property *bona fide* and without notice of the mortgage.

Held, that evidence identifying the property and promissory note described in the mortgage, as being the note and property in controversy, was proper.

Held, also, that such judgment and the assignment thereof, and the papers filed in the action wherein the judgment was obtained, as also the mortgage, were admissible in evidence.

Held, also, that the rendition of judgment on the note was no bar to the action for foreclosure.

Held, also, that an attorney's fee for taking judgment in the foreclosure suit can not be recovered. *Holmes v. Hinkle*, 518

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4. *Same.—Water-Works Bonds.—Statute Construed.*—Clause 26 of section 53 of the act authorizing the incorporation of cities, 1 R. S. 1876, p. 267, gives to the common councils of cities incorporated under such act no authority to issue, negotiate and sell bonds for the purpose of obtaining money to construct water-works. *Ib.*

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6. *Same.—Sale of Bonds.—Duties of Common Council and City Treasurer.*—It is the duty of the common council, under such act, and not of the city treasurer, to negotiate and sell such bonds; but he is liable on his bond for moneys received by him from the sale of the same, no matter by whom such sale is made. *Ib.*

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Held, on demurrer, that the answer is sufficient.

Ib.

11. *Same.—Minutes of Common Council.—Parol Evidence.*—The minutes of the proceedings of a common council are only evidence of such proceedings, and, where no minutes have been made, the proceedings may be proved by parol evidence. *Ib.*
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COMPROMISE.

See EVIDENCE.

CONDITION SUBSEQUENT.

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See FALSE IMPRISONMENT, 4.

CONSTITUTIONAL LAW.

See COMMON SCHOOLS, 2, 3; CRIMINAL LAW, 46, 47, 68 to 71; FEES AND SALARIES, 1; FUGITIVE FROM JUSTICE, 1.

CONTEMPT.

1. *Failure of Clerk to Pay Over Money.—Affidavit—Liability of Clerk and Sureties.—Criminal Law.*—In a proceeding in the name of the State, on the relation of an affiant, against the clerk of a circuit court, for contempt of an order made by that court, the verified complaint alleged, that, in a proceeding by the relator against a distributee of the estate of a certain decedent, the court had adjudged that the relator was entitled to certain moneys theretofore paid to the clerk for such distributee, and ordered that the same should be paid by the clerk to the affiant; and that demand therefor had been made upon the clerk, by the relator, prior to the making of such order, which he, in contempt of the court, had refused to obey.

Held, on demurrer, that the complaint was insufficient.

Held, also, that the demand alleged was insufficient.

Held, also, that, under the act of March 9th, 1875, 2 R. S. 1876, p. 17, the clerk and his sureties were liable, on his bond, for a failure to pay such money to the person entitled thereto, but that he can not be proceeded against for contempt of court in refusing to obey such order.

Held, also, that, for fraudulently withholding such money, he is liable to prosecution for a felony. *Swift v. State, ex rel., etc.*, 81

2. *Fine.—Judgment.*—The fine imposed by a court as punishment for a contempt of its authority must be for the use of the common school fund of the State, and not for the benefit of the relator. *Id.*

CONTESTED ELECTION.

See TOWNSHIP TRUSTEE, 3.

CONTINUANCE.

See CRIMINAL LAW, 18, 48.

CONTINUATION OF ACTION.

See STATUTE OF LIMITATIONS, 2.

CONTRACT.

See CITIES AND TOWNS, 1 to 8; CITY TREASURER, 10; CORPORATIONS, 4; COUNTY COMMISSIONERS, 3; COVENANT, 2; CRIMINAL LAW, 69; PREMIUM; PROMISSORY NOTE, 17; SPECIFIC PERFORMANCE; STATUTE OF LIMITATIONS, 4.

Contract by Copartnership.—Effect of Dissolution of Copartnership.—Abandonment of Contract.—Rescission.—Set-Off.—In an action against the members of a copartnership as such, to recover for goods sold and delivered by the plaintiff to the defendants, wherein the latter answered asking damages, by way of set-off, for alleged breaches by the plaintiff of a contract in writing, entered into between the plaintiff and the defendants as such copartners, which contract was to continue for a specified term of years, the plaintiff replied, alleging, that, after the execution of the contract and before its expiration, such copartnership had ceased to exist, thereby working an abandonment of the contract by the defendants; and also alleging, that, prior to such dissolution, the plaintiff had fully performed his part of the contract.

Held, on demurrer, that such contract, though entered into by the defendants in their copartnership name, was the joint contract of all the defendants.

Held, also, that the dissolution of the copartnership did not work an abandonment of the contract, nor authorize the plaintiff to treat it as rescinded.

Held, also, such copartnership not having been dissolved by the death of any of its members, that the defendants have the right to perform their stipulations, under the contract, and to receive the benefit thereof.

Held, also, that the reply is insufficient.

Dickson v. Indianapolis Cotton Mfg. Co., 9

CONVEYANCE.

See COVENANT; MORTGAGE, 3 to 10; SPECIFIC PERFORMANCE; VENDOR'S LIEN.

1. *Conveyance.—Condition Subsequent.—Complaint to Cancel Deed and Recover Land.—Demurrer.—Relief Regardless of Prayer.—Account for Rents, Improvements, etc.—Measure of Damages.*—A warranty deed, conveying certain lands, contained this stipulation: "This deed is upon * * * condition that the grantor * * * agrees to make her home with the "grantee, who "agrees to provide for and take care of the grantor during her natural life, and to be at all expense that may necessarily accrue for the maintenance of the "grantor. An action was instituted by the grantor, against the grantee, wherein the complaint alleged, that, commencing with a certain date, the grantee had "failed to provide for and support her, as required by the deed." Prayer, in one paragraph, that the deed be cancelled, and, in another paragraph, that the grantee be decreed a trustee of such land, required to give bond, and to account, etc.

Held, on demurrer, that the complaint is sufficient.

Held, also, that no question on the uncertainty of the averments of the complaint is presented by the demurrer.

Held, also, that regardless of the prayer of the complaint, the court may grant any relief to which, under the issues, the plaintiff is entitled.

Held, also, that such deed was upon a condition subsequent.

Held, also, that, for a failure by the grantee to perform such condition, the grantor may recover the real estate so conveyed, and have an account taken, charging the grantee with the rents of the whole tract conveyed, including any portion cleared by him, and crediting him with the value of improvements made, rents paid, and any partial performance, by him.

Hershman v. Hershman, 451

2. *Same.—Notice.*—A person contracting with the grantee of such deed, upon the faith of the arrangement between the grantee and grantor, is bound to take notice of such condition subsequent. *Ib.*

COPY.

See CITY TREASURER, 1, 2, 12; COVENANT, 8; GUARDIAN AND WARD, 11; PROMISSORY NOTE, 1, 13, 14; SHERIFF, 2.

CORONER.

See CRIMINAL LAW, 84 to 86.

CORPORATION.

1. *Demurrer.—Capacity to Sue.—Church Trustees.*—A demurrer questioning the sufficiency of a complaint by a plaintiff styled "The Trustees of" a certain "Church" does not question, but admits, the plaintiff's capacity to sue. *Wiles v. Trustees, etc.*, 206
2. *Same.—Corporate Existence.*—Such plaintiff's corporate existence is not put in issue by an answer of general denial, nor by an answer specially alleging that certain persons named in the complaint as trustees are not, in fact, trustees. *Ib.*
3. *Evidence.—Instructions.*—Under the issues made by such pleadings, error in the admission of evidence, or in the giving of instructions to the jury, relating to the corporate existence of the plaintiff, is harmless. *Ib.*

4. *Articles of Association.—Stipulation as to Payment of Wages.—Interest.—*
A stipulation in the articles of association of a corporation organized under the laws of this State, providing that each member of the association "shall receive his wages in cash, if demanded and the treasury will allow it," and that a specified rate of interest shall be allowed him on a "balance" of a certain amount due him, is binding upon each of such members. *Tell City Furniture Co. v. Nees, 245*
5. *Same.—Words and Phrases.—*The term "wages," as used in such stipulation, reasonably includes wages due to a member for work and labor performed by him for the corporation. *Ib.*
6. *Same.—Demand.—*Recovery for such wages can not be had by a member of such corporation unless he first make demand therefor, and the condition of the treasury is such that payment can be made. *Ib.*
7. *Same.—Plea in Abatement.—*An answer setting out such stipulation, and averring that the plaintiff was and is a member of the corporation, that the matter in suit is wages for labor performed by him, that he had made no demand, and that the condition of the treasury is such that payment can not be made, is sufficient on demurrer. *Ib.*
8. *Same.—Verification.—Demurrer.—*The fact that such answer is not sworn to is not presented by a demurrer thereto. *Ib.*

COSTS.

See REPLEVIN, 2 ; TRESPASS, 4.

COUNTER-CLAIM.

See COVENANT, 8 ; PARTITION, 1 ; PRACTICE, 11, 12, 13.

COUNTY.

See FEES AND SALARIES, 2.

COUNTY AUDITOR.

See FEES AND SALARIES, 2.

COUNTY CLERK.

See BILL OF EXCEPTIONS, 2 ; CONTEMPT ; JUDGMENT, 1.

COUNTY COMMISSIONERS.

See HIGHWAY, 2 ; TAXES.

1. *Summons.—*In an action against certain persons designated in the complaint as the "Commissioners of * * * County," the summons served upon them named each one personally, and styled them "Commissioners of the County of * * *"
Held, that the summons was sufficient. *Board of Comm'rs, etc., v. Verbag, 107*
2. *Same.—Pleading.—Common Count.—*A complaint in the nature of a common count, with a bill of particulars attached thereto, may properly be used in an action on account, against a board of commissioners. *Ib.*
3. *Same.—Letting Public Work.—Contract.—*A complaint against a board of commissioners alleged, that, pursuant to a proposition by the board for bids on certain work to be done for the county, the plaintiff had made a bid, which was accepted by the board, conditioned upon his giving bond, which he had done, and averred performance by him and a breach by the board.
Held, on demurrer, that the facts alleged constitute a contract, and that the complaint is sufficient. *Ib.*
4. *Same.—Answer.—Failure to Advertise.—*It is no answer to such action to allege that such letting had been made without advertising. *Ib.*

5. *Same.—Fraud.—Public Policy.*—It is a sufficient answer to such complaint to allege that the plaintiff, by promises of reward made by him to one who intended making a bid to do the work for a less sum than that bid by the plaintiff, had induced him not to make a bid. *Ib.*

COVENANT.

1. *Failure to Remove Mortgage.—Damages.*—Unless he has paid part or all of the encumbrance, or has been evicted, the grantee of land conveyed by deed covenanting against encumbrances, can recover of his grantor only nominal damages, in an action on the covenant, for failure to pay off or remove an encumbrance existing at the time of such conveyance. *Bundy v. Ridenour, 408*
2. *Same.—Verbal Promise to Pay Encumbrance.*—The verbal promise of the covenantor to the grantee to pay off such encumbrance adds nothing to the covenant. *Ib.*
3. *Counter-Claim.—Copy.*—A counter-claim, based upon an alleged breach of the covenants of a deed of conveyance of lands executed by the plaintiff to the defendant, must, to be sufficient on demurrer, set out either the original deed or a copy thereof. *Patton v. Camplin, 512*
4. *Seizin.—Husband and Wife.—Deed Executed in this, for Land in another, State.—Complaint.—Demurrer.*—In an action for damages for a breach of the covenants of warranty contained in a deed of conveyance of lands in another State, purporting on its face to have been executed in this State, for a valuable consideration, by the defendants as husband and wife, to the plaintiff, the complaint set out a copy of the deed and alleged that it had been executed in this State, between residents thereof, upon a valuable consideration, but that the defendants had never had either title to or possession of such lands.
Held, that, on joint demurrer, the complaint is sufficient, though insufficient on separate demurrer by the wife.
Held, also, that the covenant of seizin in the deed was purely personal, did not run with the land, and was broken immediately upon the execution of the deed. *Craig v. Donovan 518*

CRIMINAL CIRCUIT COURT.

See FEES AND SALARIES, 1.

CRIMINAL LAW.

See CONTEMPT, 1; LIQUOR LAW.

1. *Assault and Battery.—Evidence of Two Offences.—Election by State.*—Where, in a prosecution for assault and battery, the State has given evidence, on the trial, of one assault and battery, committed by the defendant upon the person of the prosecuting witness, she thereby elects to claim a conviction for that offence, and can not properly give evidence of another and distinct assault and battery, committed by the defendant upon the person of the prosecuting witness, and elect to abandon the former, and to claim a conviction for the latter offence. *Richardson v. The State, 192*
2. *Seduction.—Indictment.—“Promise of Marriage.”*—It is sufficient, in an indictment for seduction, to charge the defendant with having accomplished the seduction of the prosecutrix, “by means of a promise of marriage” previously made to her. *Callahan v. The State, 198*
3. *Same.—Condition of Promise.*—A “promise of marriage,” by means of which a seduction is accomplished, made by the defendant, to the prosecutrix, on condition that she will consent to the act of sexual intercourse, is a “promise of marriage” within the meaning of section 15, 2 R. S. 1876, p. 431, defining the crime of seduction. *Ib.*
4. *Same.—Promise by Married Man.*—The seduction of an unmarried fe-

- male, "under promise of marriage," by a man whom she knows to be already married and living with his wife, does not come within said section 15. *Ib.*
5. *Larceny.—Intent in Taking.*—To constitute larceny, the taking must be with a felonious intent existing at the time of the taking. *Umphrey v. The State, 228*
6. *Same.—Trespass.*—A mere tortious taking of personal property, without felonious intent is not a larceny. *Ib.*
7. *New Trial.—Assignment of Error.*—Error in giving or refusing instructions to the jury, or in admitting or excluding evidence, is cause for a new trial, but can not be properly assigned as error on appeal to the Supreme Court. *Wagner v. The State, 250*
8. *Betting on Election.—Indictment.*—An indictment, charging the defendant with losing money by betting on an election, which alleges the purchase, by the defendant, of a chattel, at its alleged value, to be paid for, at that price, only in the event of the election of a candidate named, to a particular office, at a certain election, is insufficient. *Ib.*
9. *Returning Indictment.*—Where the record does not show that the indictment has been duly returned into open court, a motion to quash or in arrest of judgment, should be sustained. *Mitchell v. The State, 276*
10. *Murder.—Insanity Produced by Disease.—Instruction.*—On the trial of a defendant indicted for murder, wherein he had introduced evidence tending to prove that he was subject to attacks of epilepsy, and that such disease tends to produce insanity, the court instructed the jury, that, "When the defence of insanity is interposed to a prosecution for murder, the jury should carefully and intelligently scrutinize and consider the evidence by which it is sought to be established. If the jury should find from the evidence, that there is a reasonable doubt whether the defendant has been subject to attacks of epilepsy and if this fact (if so found) has been supplemented by testimony of expert witnesses, establishing to the satisfaction of the jury (evidence raising a reasonable doubt being sufficient), that epilepsy is a disease which tends to produce insanity, *this evidence would not be sufficient to raise a reasonable doubt of his sanity, at the time of the alleged commission of the homicide. There must be sufficient evidence to raise a reasonable doubt of actual insanity at the time of the alleged commission of the offence.*"
- Held*, that the instruction was erroneous.
- Held*, also, that an erroneous instruction is not cured by a proper instruction unless the former be withdrawn. *Guetig v. The State, 278*
11. *Betting on Election.—Parol Evidence of Terms of a Writing.*—Parol evidence of the contents of a memorandum of the terms of a bet upon the result of an election is inadmissible, without first accounting for the absence of such memorandum. *Caldwell v. The State, 283*
12. *Larceny of Estray.—Felonious Intent.*—In order to constitute a larceny of an estray, converted by the finder to his own use, the felonious intent to misappropriate must have existed at the time he took the estray into his possession. *Starck v. The State, 285*
13. *Same.—Intent Subsequently Formed.*—The defendant in such case has a right to have the jury trying the case instructed, that, if the felonious intent was formed after he had taken possession of the estray, he was not guilty of larceny. *Ib.*
14. *Murder.—Indictment.—Description of Deceased.*—It is not necessary, in an indictment for the murder of a person therein named, to aver that such person was "a human being." *Merrick v. The State, 327*
15. *Same.—Negative Averment.*—In an indictment for murder, wherein death is alleged to have resulted from a mortal wound, made upon the

- person of the deceased "by cutting" with a purpose to kill and with premeditated malice, it need not be alleged that such wound was not inflicted in performing a necessary surgical operation upon the person of the deceased. *Ib.*
16. *Same.—Electing Between Counts.*—Where an indictment contains several counts, each charging the murder of the same person, but in a different manner, the State can not be compelled to elect between such counts. *Ib.*
 17. *Change of Venue from County.—Judicial Discretion.—Supreme Court.*—The Supreme Court will not review the overruling of a motion for a change of venue from the county, where it does not appear from the record that the court had exceeded its discretion. *Ib.*
 18. *Same.—Affidavit for Continuance.*—An affidavit for a continuance on account of the absence of a witness should show that due diligence has been used to procure the attendance of the witness, and the time when his attendance can probably be had. *Ib.*
 19. *Empanelling Special Jury.*—The court has power to order a special venire for a special jury to try a defendant, if the business of the court so require *Ib.*
 20. *Order of Introducing Evidence.*—It is within the discretion of the court to allow the State, during the introduction of the defendant's evidence in chief, to call a witness as to original matter. *Ib.*
 21. *Supreme Court.—Record.—Instructions.—Presumption.*—Where the evidence is not in the record, and the instructions given to the jury are not abstractly wrong, the Supreme Court, on appeal, will presume that the instructions were properly given. *Ib.*
 22. *Same.—Refusal to Instruct.*—In such state of the record, the refusal of the court to give to the jury an instruction asked will be presumed by the Supreme Court to have been right. *Ib.*
 23. *Murder.—Evidence.—Body of Deceased.*—It is not error, on the trial of a defendant indicted for murder, to admit evidence that a body claimed to be that of the deceased is the body of a human being. *Ib.*
 24. *Same.—Possession of Deadly Weapons.*—Where an indictment for murder charged the killing to have been caused by the infliction of mortal wounds, it was not error to admit evidence that weapons with which such wounds might have been inflicted were carried by the defendant on the alleged day of the murder. *Ib.*
 25. *Verdict.*—A general verdict of guilty "as charged in the indictment," returned on an indictment charging the same crime in separate counts, is valid. *Ib.*
 26. *Venire De Novo.*—A *venire de novo* can be awarded only where no judgment can be rendered upon the verdict, in consequence of its imperfection or uncertainty. *Ib.*
 27. *Arrest of Judgment.*—The judgment in a criminal case can be arrested only because the court has no jurisdiction of the case, or because the indictment does not state facts constituting a public offence. *Ib.*
 28. *Evidence Before Grand Jury.*—The prosecuting attorney can not be compelled to furnish the defendant with a copy of the evidence given against him before the grand jury in finding the indictment. *Ib.*
 29. *Short-Hand Reporter.—Rights of, as to Payment.—Defending as Poor Person.*—Under section 4 of the act of March 10th, 1876, 1 R. S. 1876, p. 770, a short-hand reporter may require payment or security therefor, of a party demanding a long-hand copy of his notes of the evidence, before proceeding to prepare it; though the court may, in its discretion, admit the defendant to defend as a poor person, and direct that such copy be furnished to him, to enable him to prepare a bill of exceptions. *Ib.*

30. *Same.—Bill of Exceptions.*—It is not error to refuse to admit a copy of the short-hand notes of the evidence into a bill of exceptions. *Ib.*
31. *Same.—Supreme Court.*—The Supreme Court has no authority to direct such short-hand notes to be copied, and to order them to be paid for out of the State or county treasury. *Ib.*
32. *Same.*—Error can not be predicated upon the action of the lower court in tying the short-hand notes of the evidence to the record of the cause. *Ib.*
33. *Time for Filing Bill of Exceptions.*—The length of time to be allowed for the filing of a bill of exceptions is to be fixed by the court trying the cause, in the exercise of a sound discretion. *Ib.*
34. *Duty of Coroner Holding Inquest.—Testimony Must be in Writing.*—Where a coroner of this State is holding an inquest upon the body of a decedent "supposed to have come to his death by violence or casualty," it is his duty, under the provisions of sections 8 and 9 of the act of May 27th, 1852, "prescribing the powers and duties of coroners," 2 R. S. 1876, p. 20, to cause all testimony given before him by witnesses to be reduced to writing, and subscribed by them. *Woods v. The State*, 858
35. *Same.—Presumption.—Parol Evidence as to Testimony Before Coroner.—Impeaching Witness.—Murder.*—The law conclusively presumes, that, in such case, the coroner has duly performed his whole duty, by causing all of such testimony to be reduced to writing; and unless the proper foundation be laid for secondary evidence, parol evidence of the testimony given before the coroner, by any such witness, is inadmissible, even to impeach evidence given by him as a witness on the trial of a defendant indicted for the murder of the person over whose body such inquest was held. *Ib.*
36. *Same.—When Defendant's Evidence Before Coroner is Admissible.*—Where the defendant in such case has testified in his own behalf, the written statement of evidence given by him as a witness on such inquest is admissible in evidence to contradict him. *Ib.*
37. *Change of Venue from County.*—The granting or refusing of a motion by the defendant for a change of venue from the county is a matter within the sound discretion of the court. *Short v. The State*, 876
38. *Burglary, with Intent to Commit Larceny.—Indictment.—Value of Goods.*—An indictment for burglary with intent to commit a larceny need not aver the value of the goods which the defendant is alleged to have intended to steal. *Ib.*
39. *Petit Larceny a Felony.*—Petit larceny is declared by the statute of this State to be a felony. *Ib.*
40. *Same.—Indictment for Burglary and Larceny.—Election by State.—Verdict.—Acquittal.*—The defendant in an indictment containing one count charging burglary, and another charging larceny, moved the court to compel the State to elect upon which count trial should be had, whereupon the prosecuting attorney stated to the court, that both counts related to the same transaction, and that he meant to convict of one felony only, and thereupon the motion was overruled, trial had, and a verdict returned finding the defendant guilty of burglary.
Held, that, under the circumstances, it was within the discretion of the court to overrule the motion.
Held, also, that the verdict, being silent as to the charge of larceny, acquitted the defendant on that count. *Ib.*
41. *Same.—Inspection of Article Stolen.—Magnifying Lens.—Evidence.*—One of the articles claimed to have been stolen by the defendant in such case was a gold ring bearing a certain inscription, and on the trial a gold ring which was in the defendant's possession after the burglary, claimed

by the State to be the one stolen, was exhibited to the jury who were allowed to inspect it through a magnifying lens, to ascertain whether or not such inscription had been on and removed from the ring.

Held, that this was not error. *Ib.*

42. *Return of Verdict.—Failure to Poll Jury.*—Where, on the return of a verdict against the defendant in the presence of himself and his counsel, he fails to ask that the jury be polled, he can not avail himself of an omission by the court to cause a poll of the jury to be made, without also showing, that, in fact, some of the jury were then absent. *Ib.*
43. *Omission of Name of State's Witness from Indictment.—Continuance.*—The fact that the name of a witness before the grand jury is not placed upon the indictment is not ground for striking out evidence given by him as a witness on behalf of the State, on the trial of the cause; the only effect of such omission being to prevent the State from obtaining a continuance on account of his absence. *Ib.*
44. *Incest.—Evidence.—Impeaching Witness.*—The fact as to whether or not the prosecuting witness had become pregnant by means of sexual intercourse had by her with others than the defendant, and her declarations in relation thereto, are immaterial and irrelevant, on the trial of a defendant indicted for incest, either for the purpose of impeaching her testimony or for any other purpose. *Kidwell v. The State, 384*
45. *Same.—Reputation for Chastity and Virtue.*—Evidence attacking her reputation for chastity and virtue is inadmissible. *Ib.*
46. *Constitutional Law.—Defining Crime.—Title of Act.*—Neither the title, nor the body, of a statute defining a felony need designate the felony defined by giving to it a particular name. *Peachee v. The State, 399*
47. *Same.—Blackmail.*—The act of March 10th, 1873, 2 R. S. 1876, p. 449, sufficiently defines the felony ordinarily designated "blackmailing." *Ib.*
48. *Grounds of objection to Evidence.*—The grounds of objection to the admission of evidence offered must be stated to the court, at the time the objection is made, which must appear by the record on appeal to the Supreme Court, to make error in admitting such evidence available. *Ib.*
49. *Evidence of Former Acquittal.*—An offer to introduce the record of an acquittal of the defendant on the trial of a former indictment against him, should be accompanied by an offer to identify the crime charged in that indictment with that charged in the indictment on which trial is being had. *Ib.*
50. *Perjury.—Indictment.—Juror.*—An indictment for perjury may be predicated upon alleged false answers given by the defendant while being examined under oath as to his competency to sit as a juror on the trial of a cause. See opinion for form of indictment. *The State v. Howard, 502*
51. *Malicious Trespass.—Removing Partition Fence.—Notice.*—The owner of a partition fence between his land and that of an adjoining proprietor may, if the land of the latter be unenclosed, remove such fence without giving any notice thereof. *Gundy v. The State, 528*
52. *Same.*—The fact that such removal is made by the owner after allowing the adjoining proprietor to connect therewith a fence which the latter is erecting to enclose his land, but has not completed, does not make the former guilty of malicious trespass. *Ib.*
53. *Same. —"Inclosure."*—To constitute an "inclosure," as used in section 23 of the act "concerning inclosures," etc., 1 R. S. 1876, p. 497, the fences including the partition fence, must surround some part of the land adjoining. *Ib.*
54. *Witness.—Child Under Ten Years of Age.*—The question, as to whether or not a child under ten years of age is capable of understanding the

facts about which it is to be examined, is to be determined by the court in which such child is offered as a witness, upon the answers of the child to interrogatories put to it by the court. *Batterson v. The State*, 581

55. *Same.—Judicial Discretion.*—The determination of such question by the court will not be reviewed by the Supreme Court on appeal, except for a clear abuse of its discretion. *Ib.*
56. *Misconduct of Juror.—Taking Notes of Evidence.*—The act of a juror, in taking notes of the evidence being given, is not misconduct sufficient to set aside the verdict, where he, upon being admonished by the court of the impropriety of his act, ceased taking notes. *Ib.*
57. *Same.—Verdict.—Fixing Term of Imprisonment.*—The fact that the jury, in fixing upon the term of imprisonment to be suffered by the defendant, took the quotient arising from the division of the aggregate of the periods indicated by the jurors by the number of jurors, as a proposition merely of the term of imprisonment, is not improper, if not done pursuant to a previous agreement to accept such quotient as such term. *Ib.*
58. *Newly-Discovered Evidence.*—A new trial will not be granted on the ground of newly-discovered evidence which is merely cumulative or impeaching. *Ib.*
59. *Reasonable Doubt.—Supreme Court.* Where, from the evidence, the Supreme Court, on appeal, is satisfied that a reasonable doubt of the guilt of the defendant manifestly exists, a judgment of conviction will be reversed. *Ib.*
60. *Failure of Defendant to Testify.—Instruction.—Waiver.*—Where the defendant in a criminal prosecution does not testify on the trial, he can not complain of the omission of the court to instruct the jury, under section 90 of the criminal code, in relation to his failure to testify, if he has not requested the court to so instruct. *Foxwell v. The State*, 589
61. *Open and Notorious Fornication.—Indictment.*—An indictment charged, that, on and from a certain day, until another specified day, at a certain county in this State, the defendant "unlawfully lived in open and notorious fornication together with one" E. E., "a woman," etc.
Held, on motion to quash, that the indictment sufficiently charges the alleged fornication. *The State v. Stephens*, 542
62. *Common Law.—Jury.—Instructions.*—At common law the jury in a criminal cause were the exclusive judges of the evidence, but were bound to accept, as correct, the law laid down by the court in its instructions. *McDonald v. The State*, 544
63. *Same.—The Jury Exclusive Judges of Law and Evidence.—Province of the Court Merely Advisory.*—In this State, under the present constitution, the jury in a criminal cause are the exclusive judges of both the law and the evidence. the duty of the court, in giving them instructions, being merely advisory. *Ib.*
64. *Same.*—On the trial of a criminal cause the court instructed the jury, that, "If the court instruct the jury truly and fully as to the law, the jurors must be governed by the instructions. If the court does not do this, the jury may disregard the instructions."
Held, that the instruction was erroneous. *Ib.*
65. *Excusing Juror.—Judicial Discretion.*—During the term of court at which a criminal cause was pending for trial, the court discharged the jury from further attendance until a later day in the term, and, at the same time, over the objection of the defendant in such cause, excused altogether certain of the jurors who had expressed an opinion that the defendant was guilty.
Feld, that the court exercised its discretion fairly. *Watson v. The State*, 548
66. *Murder.—Evidence.—Dying Declarations.*—On the trial of a defendant

- indicted for murder, the dying declarations of the deceased are admissible in evidence when it clearly appears, that, at the time they were made, he was aware that death was rapidly approaching. *Ib.*
67. *Same.—Premeditation.*—Where sufficient time has elapsed between the killing and an angry altercation between the deceased and the defendant for his anger to cool, the killing can not be excused as unpremeditated. *Ib.*
68. *Constitutional Law.—Brokerage in Railroad, etc., Tickets.*—“*Ticket Scalper.*”—*Police Regulation.*—The act of March 9th, 1875, 1 R. S. 1876, p. 259, “regulating the issuing and taking up of tickets and coupons of tickets by common carriers,” etc., is in the nature of a police regulation, is valid, and is not in conflict with the constitution of either the United States or this State. *Fry v. The State*, 552
69. *Same.—Impairing Obligation of Contract.—Monopoly.*—Such statute does not impair the obligations of contracts, nor does it grant to any one privileges or immunities denied to others. *Ib.*
70. *Same.—Inter-State Commerce.*—Such statute does not violate section 8 of article 1 of the constitution of the United States, which confers upon Congress the power to regulate commerce “among the several States.” *Ib.*
71. *Change of Judge.—Appointment of Judge Pro Tempore.—Constitutional Law.*—The act of March 7th, 1877, Acts 1877, Reg. Sess., p. 28, in so far as it authorizes the judge of a court, on a change of venue from him, to appoint a judge *pro tempore*, is constitutional. *The State v. Dufour*, 567
72. *Compelling State to Elect.—Judicial Discretion.—Supreme Court.*—The discretion of a court, in compelling the prosecuting attorney to elect upon which of several counts of an indictment he will try the defendant, is to be exercised in accordance with enlightened views and judicial precedents; and, unless such discretion is abused, the decision of that court will not be revised by the Supreme Court. *Ib.*
73. *Same.—Harmless Error.*—Where, under the counts upon which the prosecuting attorney elects to try the defendant, evidence of the facts charged in the other counts is admissible, error in compelling such election is harmless. *Ib.*
74. *Formal Averments of Indictment.*—Where the record of the cause sufficiently shows, and the first count of the indictment sufficiently alleges, the merely formal facts of the finding and return of the indictment into the proper court by the proper grand jury, while the remaining counts merely allege, as to such formal matters, that “the grand jurors aforesaid, upon their oaths aforesaid, do further present,” etc., the fact that the prosecuting attorney elects to abandon the first count does not render the other counts bad for want of such formal averments. *Ib.*
75. *Forgery of Certificate of Acknowledgment of Conveyance.*—An indictment predicated upon the alleged forging and uttering of a certificate of acknowledgment of the execution of a deed conveying certain lands, with intent to defraud the owner of the land or his heirs, assumes the validity of the conveyance itself, as between the grantor and grantee, and is insufficient. On this point BIDDLE, J., dissents. *Ib.*
76. *Alibi.—Instruction to Jury.*—An instruction to a jury, which tends to prejudice their minds against evidence introduced by the defendant to establish an alibi, or which tends to cast suspicion upon such defence, is erroneous. *Albin v. The State*, 598

DAMAGES.

See CONVEYANCE, 1; COVENANT, 1, 4; FALSE IMPRISONMENT, 2, 3; GUARDIAN AND WARD, 19, 21; HIGHWAY, 2; TRESPASS, 2, 4.

DEATH.

See MORTGAGE, 2; PARTITION, 1, 2.

DECEDENTS' ESTATES.

See CONTEMPT, 1; GUARDIAN AND WARD, 18; PARTNERSHIP, 2, 8; STATUTE OF LIMITATIONS, 4, 5.

1. *Priority of Debts.—Judgment.*—The rights of priority, and the order of payment, of claims against a deceased debtor's estate, are fixed and determined by section 109 of the act in relation to the settlement of decedents' estates, 2 R. S. 1876, p. 534, and can not be determined otherwise by the judgment of a court. *Jenkins v. Jenkins*, 120

2. *Same.—Judgment of Priority of One over Others.—Notice.*—A judgment giving priority to the plaintiff's claim, rendered in an action by the administrator personally against such estate, does not bind creditors who have had no notice of such action. *Ib.*

3. *Same.—Insolvent Estate.—Former Adjudication.—Merger.—Practice.*—The administrator of the estate of a deceased debtor, being himself a creditor, filed his claim against the estate and procured its allowance by the court, simply as a general claim. He afterward filed a complaint against such estate, asking that the estate be declared insolvent, and that his judgment be adjudged a preferred debt, alleging as ground that the claim was secured by a mortgage executed to him, by his decedent, in his lifetime, on personal property which he had since, as administrator, converted into money. Upon the hearing of the cause it was found by the court that the estate was probably insolvent, and decreed that such claim should be paid out of the proceeds of such property, as a preferred debt. Afterward, upon filing what he intended as his final report, exceptions were filed thereto by other creditors, tried by the court and determined in their favor, whereupon the court, over his objections and exceptions, ordered his said complaint for preferment to be re-docketed for trial.

Held, on a verified motion by the plaintiff to strike the cause from the docket, setting out the proceedings had by him and the judgments rendered in his favor, that the judgment of preferment did not bind the other creditors, and that the motion was properly overruled.

Held, also, that, by obtaining the allowance of his claim as a general debt, it was merged in the judgment of allowance, and that his action for preferment could not be maintained. *Ib.*

4. *Guardian and Ward.—Petition by Surety against Administrator of Deceased Guardian.—Order of Court to Pay over Ward's Estate.—Judgment.—Appeal to Supreme Court.*—A surety upon the bond of a deceased guardian filed a petition against the administrator of such decedent's estate, representing that the moneys belonging to the ward were in the hands of such administrator, who was paying the same out upon the general debts of such estate, and praying that the administrator be ordered to make a report of the amount of the ward's estate in his hands and pay the same over to the court for the use of such guardian's successor. Whereupon, under the order of the court, the administrator reported that his decedent's estate was chargeable with a certain sum belonging to such ward, that the estate was insolvent, and that the decedent had so commingled his ward's estate with his own, that the same could not be identified; and thereupon the court approved the report and ordered the administrator to pay into court, for the benefit of the ward, the amount so reported as belonging to him.

Held, that the surety, having paid no part of the amount due from his principal, had no right of action, and that such order was erroneous.

Held, also, that such order was a final judgment from which an appeal lies to the Supreme Court. *Covey v. Neff*, 891

DECLARATIONS.

See CRIMINAL LAW, 66.

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DEFAULT.

See ESTOPPEL, 1; PRACTICE, 1, 8, 9, 28.

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See CORPORATION, 6, 7; LANDLORD AND TENANT.

DEMURRER.

See CONVEYANCE, 1; CORPORATION, 1, 8; COVENANT, 4; HIGHWAY, 7; PLEADING, 3, 4; PRACTICE, 3; REVIEW OF JUDGMENT; SPECIFIC PERFORMANCE; STATUTE OF LIMITATIONS, 3.

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See ESTOPPEL; HUSBAND AND WIFE, 1, 2; PARTITION, 1, 2.

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See PROMISSORY NOTE, 20.

ESCHEAT.

See COMMON SCHOOLS.

ESTOPPEL.

See CITY TREASURER, 14; CONVEYANCE, 2.

1. *Partition.—Married Woman.—Descents.—Effect of Judgment of Foreclosure by Default.—Widow.—Heir.—Sheriff's Sale.—Pleading.*—In an action by a married woman and her second husband, to obtain partition of lands descended from her deceased former husband, against one alleged to be the owner of the undivided two-thirds by virtue of a purchase by him at a sheriff's sale of such lands on a decree of foreclosure of a mortgage thereon, executed by the decedent to a third person, during the existence of such marriage relation, the defendant answered, alleging that the plaintiff was estopped because of the facts, that, in such foreclosure suit, to which she and the children of such decedent were defendants, the complaint alleged that the defendants were "heirs" of the decedent, and that, on default, a decree of foreclosure was rendered, adjudging "that from and after" sale thereon "the equity of redemption of the said defendants be forever barred," etc.

Held, on demurrer, that the answer is insufficient.

Held, also, that a widow is not an "heir" of her husband, in the general sense of that term.

Held, also, that such judgment by default concluded the plaintiff only as to her rights as an alleged "heir," and not as the widow, of the decedent.

Unfried v. Heberer, 67

2. *Same.—Estoppel in Pais*—An answer in such action, alleging as matter of estoppel that the plaintiffs were both present at such sheriff's sale to the defendant, without disclosing their pretended title, and that they had received one-third of the purchase-money paid by the defendant, is insufficient on demurrer. *Ib.*

3. *Same.—Subsequent Coverture*.—The rule, that a married woman can not divest her title to real estate by an estoppel *in pais*, applies with greater force to an attempt to estop her from claiming title to lands descended from a deceased former husband, by means of matter *in pais* existing during a subsequent coverture. *Ib.*

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Proposition for Compromise.—An unaccepted proposition for a compromise of a legal controversy is not competent evidence for either party.

Board of Comm'rs, etc., v. Verbarq, 107

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See DECEDENTS' ESTATES; HUSBAND AND WIFE, 6; PARTNERSHIP, 2, 8.

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See INSANE PERSON, 2.

EXTENSION OF TIME.

See PROMISSORY NOTE, 25.

FALSE IMPRISONMENT.

1. *Action on the Case.—Trespass.—Evidence*.—In an action for damages for false imprisonment, wherein the complaint alleged that the defendants, while unlawfully holding the plaintiff in custody, had compelled him,

by menaces, force and as the price of his liberty, to execute and deliver to one of the defendants a promissory note for a certain sum, the defendants offered to prove that the payee had directed a codefendant to visit the plaintiff, to procure him to execute such promissory note, pursuant to a contract which, the payee stated to such codefendant, existed between the payee and the plaintiff.

Held, that the evidence was properly excluded. *Stewart v. Maddox*, 51

2. *Same.—Measure of Damages.—Exemplary Damages.*—Where, in such action, the facts alleged or proved against the defendants amount to a criminal offence, exemplary damages can not be recovered. *Ib.*

3. *Same.—Compensatory Damages.*—In assessing the damages to be recovered by the plaintiff in such an action, the jury trying the case are not restricted to the mere naked amount of pecuniary loss suffered by the plaintiff; but they may also take into consideration any indirect pecuniary injury which is a necessary consequence of the defendant's direct act, if warranted by the averments of the complaint, such as loss of time, delay in business and expenses incurred; also the plaintiff's physical suffering, such as bodily pain, permanent disability and disfigurement; also the plaintiff's mental suffering, such as anguish of mind, sense of shame or humiliation and loss of honor; and also injury to the plaintiff's business, profession, reputation, or social position;—all of which are compensatory, and not exemplary. *Ib.*

4. *Defence.—Pleading.—Affidavit Charging Trespass.—Arrest by Constable, on Warrant.—Posse Comitatus.*—In an action for damages for false imprisonment, the defendant answered, alleging that the grievance complained of had been committed by him whilst assisting a constable, on being required so to do by the latter, in arresting the defendant on a warrant issued to such constable, by a justice of the peace having jurisdiction, on an affidavit made by the defendant charging the plaintiff with having, "on or about," etc., "at," etc., "committed a malicious trespass, by entering on the premises of" the defendant and "pulling off and taking away" rent corn belonging to the place; which warrant commanded the arrest of the plaintiff "to answer a charge of having, at," etc., "on or about," etc., "committed a trespass, as" the defendant "has complained on oath."

Held, on demurrer, that, looking to the affidavit and warrant, neither is void, though informal and erroneous, and that the answer is sufficient.

Held, also, that, under the affidavit, a warrant for simple trespass may have been intended to be issued.

Held, also, that, under the warrant, upon the call of the constable, the defendant was justified in assisting to make the arrest.

Goodwine v. Stephens, 112

FEEES AND SALARIES.

1. *Salary of Prosecuting Attorney of Marion Criminal Circuit Court.—Jurisdiction.—Term of Office.—Constitutional Law.*—In a proceeding against the auditor of State, for a writ of mandate requiring the defendant to issue to the plaintiff a warrant upon the state treasurer for salary alleged to be due to the plaintiff as prosecuting attorney, the complaint alleged that the defendant had been duly elected and qualified as prosecuting attorney of the 16th Judicial Circuit, which was created by the act of December 20th, 1865, Acts 1865, Spec. Sess., p. 153.

Held, on demurrer, that the complaint is insufficient

Held, also, that the court created by said act was the Marion Criminal Circuit Court, a court of jurisdiction inferior to that of the circuit courts mentioned in section 1 of article 7 of the constitution of this State.

Held, also, that the salary of the prosecuting attorney of such court is to be paid, not out of the state, but out of the county treasury.

Held, also, his term of office not having been fixed by that act, that, by section 2 of article 15 of the constitution of this State, his term of office continues four years.

Cropsey v. Henderson, 286

2. *County Auditor—Deputy or Employee.—Posting Notices of Sale.—School Fund Mortgage.—Principal and Agent.*—In giving notice of a sale of real estate embraced in a school fund mortgage, as required by section 95 of the school law, 1 R. S. 1876, p. 801, while the fee and salary act of March 12th, 1875, was in force, it was the personal duty of the county auditor to post notices of such sale without other compensation than was provided for him in the latter act for managing the school fund of his county; and one, who, under employment by the county auditor, performed such duty, could look only to the county auditor personally, and not to the county, for compensation. *The Board, etc., v. Leslie*, 492

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See REVIEW OF JUDGMENT; STATUTE OF LIMITATIONS, 1, 2.

FUGITIVE FROM JUSTICE.

1. *Constitution and Laws of the United States.—Habeas Corpus.*—Section 7 of the act of March 9th, 1867, 2 R. S. 1876, p. 421, in relation to fugitives from justice, expressly authorizes, and neither section 2 of article 4 of the Constitution of the United States, nor section 5278 of the Revised Statutes of the United States, forbids, a court of this State to enquire whether or not the person charged really is a fugitive from justice. *Hartman v. Aveline*, 344
2. *Same.—Governor's Requisition.—Arrest and Surrender of Fugitive.*—The mere recitals contained in the requisition of the Governor of another State, upon the Governor of this State, for an alleged fugitive from justice, are not sufficient of themselves to authorize the arrest and surrender of the alleged fugitive. *Ib.*
3. *Same.—Who is not a Fugitive.*—One who, at and continuously after

the alleged time of the commission of a crime by him in another State, was within this State, is not a "fugitive from justice." *Ib.*

GAMING.

See CRIMINAL LAW, 8, 11; PREMIUM.

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See ATTACHMENT, 4, 5.

GUARDIAN AND WARD.

See DECEDENTS' ESTATES, 4.

1. *Sale of Ward's Real Estate.—Payment by Cancelling Guardian's Debt.*—A guardian, on making sale of his ward's real estate, has no right to receive from the purchaser, as a part of the purchase-money, his own promissory note or other individual obligation, held against him by the purchaser. *Bevis v. Heflin, 129*
2. *Same.—Action Against Purchaser for Purchase-Money, or to Set Aside Sale.*—Where a guardian does receive such a payment, and fails to account for the amount thereof in money, the ward may maintain an action against the purchaser, either for the purchase-money or to set aside such sale. *Ib.*
3. *Same.*—Such a sale deprives the ward of no rights, so long as the property, or the proceeds thereof, can be traced in the hands of any one having full knowledge of all the equities. *Ib.*
4. *Same.—Principal and Agent.—Sale by Agent.*—One who acts as the agent of another, in making a sale of real estate belonging to the principal, has no right to receive from the purchaser, as a part of the purchase-money, a discharge of an individual obligation held against him by the purchaser. *Ib.*
5. *Same.—Applying Payment.—Presumption.*—A purchaser of real estate from one who makes the sale as the guardian of one, and as the agent of another, joint owner, and pays part of the purchase-money by surrendering and satisfying an obligation held by him against such guardian and agent individually, has no right to presume that such payment will be applied on the amount due to such principal and not on the amount due to the ward. *Ib.*
6. *Same.—Husband and Wife.*—The fact that such contract of sale was made with the knowledge of the husband of such principal, who was an infant, and that, by the terms of such contract, such obligation was to be applied as a payment upon the purchase-money due to the principal, does not make such a payment valid. *Ib.*
7. *Same.—Report of Sale by Guardian.*—The facts, that the residue of the purchase-money was paid in cash, and that the guardian reported the sale of the ward's real estate as made for cash, do not make such sale valid as against the ward. *Ib.*
8. *Same.—Ratification of Sale by Ward*—A recovery by the ward, against the guardian and his sureties, for the amount of such sale, constitutes, *prima facie*, a ratification of the sale by the guardian. *Ib.*
9. *Release of Surety, and Execution of New Bond.—Action on Old Bond — Answer.*—Where, by order of the proper court, upon his own application, a surety on a guardian's bond is released from his suretyship, and a new bond, with new surety, has been executed, he is thereby released as to any future liability on his bond; but such facts constitute no answer, on behalf of such surety, to a complaint on the old bond, for a prior breach. *The State, ex rel., etc., v. Page, 209*
10. *Same.—Former Recovery.*—An answer in such action, by such surety, alleging a former recovery by the plaintiff, in an action on such new bond, against such guardian and the new surety, is insufficient on demurrer. *Ib.*

11. *Complaint on Bond of Guardian of Habitual Drunkard.—Copy.*—In an action on the bond of the guardian of an habitual drunkard, the bond itself, or a copy thereof, must be filed with the complaint as an exhibit.
Miller v. The State, ex rel., etc., 219
12. *Action on Guardian's Bond.—Settlement of Trust.—Removal of Guardian.*—An action may be maintained on the bond of a guardian, by the ward, for a breach thereof, before the settlement of the estate or removal of the guardian.
Bescher v. The State, ex rel., etc., 802
13. *Relator.—Parties Plaintiffs.*—A joint and several bond, executed by the guardian of several wards, may be put in suit on the relation of any one of them, without joining the others as relators.
Ib.
14. *Same.—Parties Defendants.—Non-Joinder of Surety.*—An action on such bond may be maintained without joining the sureties therein as parties defendants.
Ib.
15. *Same.*—Where, in an action on the relation of one only of several wards, on their guardian's bond, it is alleged that credits allowed to the guardian, in his reports to the court, jointly against all the wards, should have been allowed, not against the relator, but against the other wards, the guardian of the latter may properly be made a party defendant.
Ib.
16. *Mistake.—Negligence.—Account Current.—Receipt.—Answer.—Evidence.*—Where, in an action on a guardian's bond, the complaint alleges mistake, negligence and waste on the part of the guardian, resulting in loss to the trust estate, an answer alleging that current settlements, covering the matters in issue, had been made by the guardian and approved by the court, prior to his final settlement, is insufficient; and evidence is admissible to show the incorrectness of the vouchers filed with such reports.
Ib.
17. *Acceptance by Guardian of Promissory Note, as Payment of Money due Ward.*—A guardian has no right, on settlement with an administrator or other person having funds belonging to the ward, to accept any thing but cash in payment of the amount due to his ward; and if he accept, as cash, a promissory note or other obligation, which proves worthless or is lost in collection, he is liable therefor on his bond.
Ib.
18. *Same.—Statute Construed.—Section 114 of Decedents' Estates' Act.*—Section 114, 2 R. S. 1876, p. 536, of the act in relation to the settlement of decedents' estates, authorizes only an adult legatee or heir, and not the guardian of a minor, to accept a chose in action as a payment.
Ib.
19. *Special Finding of Court.—Proceeds of Real Estate.—Damages.—Liability on Original Bond.—Presumption.*—Where, in the special finding of facts by the court, in an action on the original bond of a guardian, the court charges him with "an amount received from the sale of real estate," but it does not appear that such sum was realized from a sale by the guardian of his ward's real estate, and the evidence is not in the record, the Supreme Court, on appeal, will presume in favor of the finding.
Ib.
20. *Non-Joinder of Surety.*—The guardian is liable in an action on his original bond, for the proceeds of a sale by him of his ward's real estate, where his surety is not joined with him as a defendant.
Ib.
21. *Exemplary Damages.—Stay of Execution.—Judgment.—Appraisement.*—The judgment in an action on the bond of a guardian may include ten per cent. on the amount due the ward, as damages, and may be rendered without stay of execution or benefit of appraisement laws.
Ib.

HABEAS CORPUS.

See FUGITIVE FROM JUSTICE.

HEIR.

See COMMON SCHOOLS, 2 to 4; ESTOPPEL, 1; HUSBAND AND WIFE, 6; MORTGAGE, 2; SPECIFIC PERFORMANCE.

HIGHWAY.

1. *Trespass.—Defence.—Opening Highway Through Enclosed Lands.—Notice to Owner to Move Fence.*—Where, in an action by the owner of land, for damages for unlawfully entering upon his premises and throwing down his fences, the defendants justify by alleging that the acts complained of were committed by them as township trustee, supervisor and laborers, in opening a highway duly located by order of the proper board of commissioners, it is necessary to allege also, that the notice required by section 41 of the highway act, 1 R. S. 1876, p. 534, has been given. *Suits v. Murdock, 73*
2. *Same.—County Commissioners.—Order Locating Highway.—Viewers.—Reviewers.—Judgment Unappealed From.—Jurisdiction.—Waiver.—Description of Route.—Record of Highway.—Damages.—Remonstrance.—Tender.*—From the record of the county commissioners, attached to the answer, it appeared, that, upon a legal petition for the location of the highway in question, viewers were appointed, who reported to the proper board of commissioners, that they had "carefully viewed the said proposed route, * and * believe the location will be of public utility, and thirty feet wide," describing the route particularly; that such report was received and confirmed by the board; that, upon remonstrance, reviewers were appointed, who reported to such board, that they had found that the highway proposed would "be of utility" and had "laid it out thirty feet wide," describing the route as described by the viewers, and allowing a certain sum to the remonstrant as damages "to be paid by the original petitioners, or persons benefited," etc.; that thereupon the board had made an order, that, "whenever the original petitioners shall pay to" the remonstrant the said damages, "then the said highway shall be located and established on said route, thirty feet in width, and that the said road shall be opened accordingly," etc., and that the proper trustee be notified thereof. Such notice had been given, such damages tendered, and the tender kept good.
Held, that the board had jurisdiction, and, no appeal having been taken from their order, it could only be avoided by showing it to be void.
Held, also, that, by failing to appeal, any question as to the order for payment of the damages assessed was waived.
Held, also, that an objection that the highway should have been ordered to be taken equally from adjoining proprietors is of no force, it not appearing that the route was upon a line between adjoining proprietors.
Held, also, that viewers only, and not reviewers, have authority to lay out and mark a highway.
Held, also, that a board of commissioners has no power to lay out and mark a highway.
Held, also, that, where the report of viewers specifies the route of the highway to be on a straight line between permanent specified points, such an order as was made in this case is sufficient.
Held, also, that the record of the highway laid out by the viewers could not be made by the board until after the report of the reviewers. *Ib.*
3. *Petition to Ascertain, Describe and Record Highway.—Motion to Strike Out.*—The judgment of a court, rendered upon a petition for ascertaining, describing and entering of record an unrecorded highway, will not, generally, be reversed by the Supreme Court, for overruling a motion to strike out parts of the petition. *Vandever v. Garshwiler, 185*
4. *Same.—Motion to Dismiss.*—It is not error to overrule a motion to dismiss the petition, where no ground for the motion is specified. *Ib.*
5. *Same.—Electing Between Paragraphs.*—The petitioners in such case can not be compelled to elect upon which of several paragraphs of their petition they will proceed to trial. *Ib.*
6. *Same.—Number of Freeholders.*—Such a petition is not required to be signed by twelve freeholders of the county. *Ib.*

7. *Same.—Demurrer.*—The sufficiency of such a petition may be tested by demurrer or motion. *Ib.*
8. *Same.—Notice.*—Such petition should state the names of the owners of lands affected, so that the court may cause proper notice to be given. *Ib.*
9. *Same.—Appearance.*—An appearance by a remonstrant cures the want of notice. *Ib.*
10. *Same.—Viewers not Required.—User.*—Viewers are not required in such proceeding; as the fact necessary to be established is, in one class of cases, user for more than twenty years, with the consent of the owners, or, in the other class, that the highway has been laid out but not recorded. *Ib.*
11. *Same.—New Trial.*—Error in refusing to strike out parts of the petition, or in overruling a motion to dismiss the same, are not causes for a new trial. *Ib.*

HORSE-RACE.

PREMIUM.

HUSBAND AND WIFE.

See COVENANT, 4; ESTOPPEL; GUARDIAN AND WARD, 6; MORTGAGE, 1, 2, 9; REVIEW OF JUDGMENT; TRESPASS, 1; VENDOR'S LIEN.

1. *Post-Nuptial Agreement.—Statute of Descents.*—Sections 86 and 40 of the statute of descents, 1 R. S. 1876, p. 414, must be construed together, in so far as they relate to post-nuptial agreements for the benefit of wives. *Randles v. Randles*, 93
2. *Same.—Agreement must be in Writing.—Assent of Wife.*—A post-nuptial agreement, making a pecuniary provision for the wife in lieu of her rights in the real estate of her husband, must, to be valid, be evidenced by a deed or other written instrument bearing an endorsement, or attached to a written acknowledgment, of her "assent to receive the same, in lieu of all" her "right or claim, * * * in the lands of the husband." *Ib.*
3. *Same.—Partition.—Quieting Title.—Cross Complaint.*—In an action by the heirs, to partition the lands of an intestate among themselves, and to quiet their title thereto as against the widow, the complaint alleged that she had entered into a post-nuptial agreement with the intestate, and had accepted a pecuniary provision made thereby, in lieu of her right in his lands.
Held, it not being averred that such agreement was in writing, that it will be deemed to have been merely verbal, and therefore invalid.
Held, also, that an answer by her, in the nature of a cross petition or complaint, avoiding the alleged agreement, and claiming her third interest as widow, is sufficient. *Ib.*
4. *Same.—Evidence.*—Where, in such action, there is no evidence of a valid post-nuptial agreement, the finding on that point must be against the party alleging it. *Ib.*
5. *Goods Purchased by Wife in another State.—Common Law.—Statute of Foreign State.*—Certain household goods, purchased by a married woman, with her own means, and used in her husband's household, in another State, were removed by them into this State, where they were seized upon an execution against a third person.
Held, in an action by the wife and her husband, to try the rights of property, that it is presumed, the contrary not being alleged and proved, that the common-law rule, vesting such goods in the husband, prevailed in such other State, and that, for want of title in herself, she can not recover. *Smith v. Peterson*, 248

6. *Mistake.—Reforming Mortgage executed by Husband and Wife.—Parties.*—A mistake in the description of lands belonging to a decedent, intended to be included in a mortgage executed in his lifetime by him and his wife, may be corrected in an action for that purpose, against his widow and heirs or devisees and administrator. *Wilson v. Stewart*, 295.

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IDEM SONANS.

See LIQUOR LAW, 5, 7.

IMPEACHMENT OF WITNESS.

See CRIMINAL LAW, 85, 86, 44, 45.

INCEST.

See CRIMINAL LAW, 44, 45.

INDEMNITY.

See MORTGAGE, 7.

INDEX.

See MORTGAGE, 18, 19.

INDIANS.

See TAXES.

INDICTMENT.

See CRIMINAL LAW, 2, 8, 9, 14, 15, 27, 38, 40, 50, 61, 74, 75; LIQUOR LAW, 4, 6.

INFANCY.

See PROMISSORY NOTE, 18; STATUTE OF LIMITATIONS, 4.

INFORMATION.

See COMMON SCHOOLS.

INJUNCTION.

See CITIES AND TOWNS, 3; JUDGMENT, 8.

INQUEST.

See CRIMINAL LAW, 34 to 36.

INQUEST OF LUNACY.

See INSANE PERSON.

INSANE PERSON.

1. *Inquest of Lunacy.—Judgment.—Appeal to Supreme Court.*—The defendant in a statutory inquest of lunacy may personally appeal to the Supreme Court from a judgment rendered upon a verdict declaring him to be a person of unsound mind. *Cunco v. Bessoni*, 524
2. *Testimony of Expert.—Witness.*—The testimony of an expert, in relation to the sanity of a person, should be tested by the same general rules as the testimony of other witnesses. *Id.*

INSANITY.

See CRIMINAL LAW, 10; INSANE PERSON.

INSTRUCTION TO JURY.

See CORPORATION, 3; CRIMINAL LAW, 7, 18, 21, 22, 62 to 64, 76; NEW TRIAL, 9; PRACTICE, 20, 22; PROMISSORY NOTE, 12; RAILROAD, 12; SUPREME COURT, 6.

1. *New Trial.*—The mere fact that an instruction to a jury is "out of place

and not pertinent to the issues" is not ground for a new trial, nor for reversing the judgment. *Wiles v. Trustees, etc.*, 206

2. *Harmless Refusal*.—Where the substance of an instruction refused is embraced in one given, such refusal is harmless.

Pate v. First Nat'l Bank, etc., 254

INSURANCE.

Fire Insurance.—Policy.—Stipulation as to Loss during Non-Occupancy of Premises Insured.—Notice.—A policy of insurance against loss by fire, issued upon a house occupied by a tenant, provided, that, if the house "shall, at any time * during the continuance of this insurance, become unoccupied, * then and * thenceforth, so long as the same shall be so unoccupied, these presents shall cease and be of no force or effect."

Held, in an action on such policy, to recover for a loss by fire occurring at a time when the house was unoccupied, that the plaintiff can not recover.

Held, also, that notice of such non-occupancy is not required.

Held, also, that, by such non-occupancy, the policy became, not wholly void, but simply inoperative until the house should be reoccupied.

Aetna Ins. Co. v. Meyers, 238

INTEREST.

See CORPORATION, 4; PROMISSORY NOTE, 23.

Open Account.—Interest on an open account may, in a proper case, be allowed.

Young v. Dickey, 31

INTERPLEADER.

See ATTACHMENT, 5.

INTERROGATORY TO JURY.

See LIQUOR LAW, 1; PRACTICE, 17 to 21, 22; PROMISSORY NOTE, 5.

JUDGMENT.

See CHATTEL MORTGAGE, 2; CONTEMPT, 2; DECEDENTS' ESTATES; ESTOPPEL, 1; GUARDIAN AND WARD, 21; HIGHWAY, 2; INSANE PERSON, 1; PARTITION, 2; PARTNERSHIP, 3; PRACTICE, 5, 17, 23; PROMISSORY NOTE, 5; REPLEVIN, 2; REVIEW OF JUDGMENT; SUPREME COURT, 18; VENDOR'S LIEN.

1. *Entering and Signing of.—Statute Construed.—Duties of Judge and Clerk*.—Section 22 of the circuit courts act of June 1st, 1852, 2 R. S. 1876, p. 10, in relation to the entering and signing of judgments, and the issuance of process thereon, is directory merely. *Jones v. Carnahan*, 229
2. *Same.—When Execution may be Issued*.—Such section contemplates, that single judgments or decrees may be immediately read and signed, separately from the other proceedings of the same day, so that executions may at once be issued thereon. *Ib.*
3. *Irregularity in Issuing Execution may be Taken Advantage of only by Defendant.—Parties*.—Irregularity in the issuance of an execution can be objected to, not by the plaintiff in any other execution or judgment against the same defendant, but only by the defendant himself; and even then only in a direct, and not in a collateral, proceeding. *Ib.*
4. *Extent of Relief Granted*.—The extent of the relief to be granted by a judgment is restricted to the relief prayed for in the complaint, only in cases where there is no answer. *Humphrey v. Thorn*, 296
5. *Same.—Supreme Court.—Petition for Rehearing*.—The fact that the judgment of the Supreme Court, in a case wherein an answer was filed, is broader than the relief prayed for in the complaint, is not ground for a rehearing. *Ib.*
6. *Action Upon*.—A judgment is a debt of record, upon which an action may be maintained, either in the court which rendered such judgment or in any other court of competent jurisdiction, and the judgment plaintiff

may at once renew his action, *ad infinitum*, upon each successive judgment thus recovered. *Gould v. Hayden*, 443

7. *Same.—Last Judgment Merges Preceding.*—Where a judgment is thus recovered upon a judgment, the latter is merged in the former, and all of its liens or priorities are released. *Ib.*
8. *Same.—Lien.—Execution.—Injunction.*—Where a judgment is recovered in a court of competent jurisdiction in another State, upon a judgment previously rendered in this State, the latter is merged in the former, all of its liens or priorities upon lands in this State are abandoned, and the owner of such lands may enjoin a sale of the same upon an execution issued thereon. *Ib.*

JUDICIAL ACT.

See TAXES, 3.

JUDICIAL DISCRETION.

See CRIMINAL LAW, 17, 20, 29, 37, 40, 55, 65, 72; PRACTICE, 2, 24.

JURISDICTION.

See CITIES AND TOWNS, 2, 10; FEES AND SALARIES, 1; HIGHWAY, 2.

JURY.

See CRIMINAL LAW, 19, 50, 56, 62 to 64, 65; NEW TRIAL, 6; PRACTICE, 22.

JUSTICE OF THE PEACE.

See APPEAL BOND; ATTACHMENT, 2; PLEADING, 5; PROMISSORY NOTE, 13 to 16; RAILROAD, 1; REPLEVIN, 2; TRESPASS, 1.

LANDLORD AND TENANT.

See CHATTEL MORTGAGE, 1.

1. *Forfeiture of Lease for Non-Payment of Rent.—Demand.*—By the terms of a written lease of a tract of real estate, the tenant was to pay to the landlord annually, on a specified day, a stipulated sum of money as rent; and if the annual rent was not promptly paid, as it became due, on or before the day specified, the lease was to be null and void.
Held, there being no place of payment stipulated, that, to work a forfeiture of the lease for non-payment of rent, payment of the rent due should have been demanded by the landlord of the tenant, on the premises, just before sunset on the day specified.
Held, also, that a demand, made at any other time on such day, worked no forfeiture of the lease. *Jenkins v. Jenkins*, 415
2. *Same.—Notice to Quit for Non-Payment of Rent.—Service.—Statute Construed.*—The ten days' written notice to quit for non-payment of rent, under section 4 of the act of May 20th, 1852, 2 R. S. 1876, p. 336, "regarding landlords, tenants," etc., must under section 6 of such act, be served by delivering the notice itself to the tenant, or, if he can not be found, to some person of proper age and discretion, residing on the premises, after having first made known to him the contents of the notice. *Ib.*
3. *Same.*—Service of such notice by reading the same to the tenant is insufficient. *Ib.*

LARCENY.

See CRIMINAL LAW, 5, 6, 12, 13, 38 to 41.

LEGAL DISABILITIES.

See PROMISSORY NOTE, 18; REVIEW OF JUDGMENT; STATUTE OF LIMITATIONS, 3, 4.

LEGALIZING ACT.

See CITY TREASURER, 5, 6.

LIEN.

See CHATTEL MORTGAGE, 1; JUDGMENT, 8; MECHANIC'S LIEN; VENDOR'S LIEN.

LIQUOR LAW.

1. *Act of 1873, Section 12.—Action by Wife.—Exemplary Damages.—Interrogatory to Jury.—Remittitur.—Supreme Court.*—On the trial of an action by a married woman, instituted under the 12th section of the act of February 27th, 1873, Acts 1873, p. 151, regulating the sale of intoxicating liquors, to recover damages for the act of the defendant in unlawfully causing the intoxication of her husband, the jury trying the cause, with their general verdict assessing damages in favor of the plaintiff, returned an interrogatory put to them, answering that a specified sum of the damages assessed by their general verdict was allowed as exemplary damages.
Held, that the allowance of exemplary damages was unauthorized.
Held, also, that the exemplary damages should be remitted, in the Supreme Court on appeal, or the judgment reversed. *Schafer v. Smith*, 226
2. *Sale to Minor.*—A sale of intoxicating liquor to a minor, made by the seller in the reasonable and honest belief that such minor is of full age, is not a violation of the liquor law. *Robinius v. The State*, 285
3. *Personal Appearance of Minor.*—The court has no right to take into account, in determining the guilt or innocence of such seller, the personal appearance of such minor as to age. *Ib.*
4. *Sale Without License.—Indictment.—Supreme Court.—Practice.*—An indictment for retailing intoxicating liquors without license charged the defendant with having made a certain sale, without "then and there having a license from the board of commissioners" of the county wherein the sale was made.
Held, that the indictment is insufficient.
Held, also, that the sufficiency of an indictment may be questioned, for the first time, in the Supreme Court, on appeal. *O'Brien v. The State*, 242
5. *Name.—Idem Sonans.*—Proof of an unlawful sale of intoxicating liquor to one "Hairholts" does not sustain the allegation of an unlawful sale to one "Hairholser." *Mitchell v. The State*, 276
6. *Affidavit.—Sale to Person in the Habit of Becoming Intoxicated.—Quantity.*—An affidavit for an alleged unlawful sale of intoxicating liquor must, to be sufficient, aver the sale of some particular quantity less than a quart, even where the sale is alleged to have been made to a person in the habit of becoming intoxicated. *The State v. Zeitler*, 441
7. *Criminal Law.—Idem Sonans*—Proof of an unlawful sale of intoxicating liquor to one "Hairholts" will not support an indictment charging an unlawful sale to one "Hairholser." *Mitchell v. The State*, 574
8. *Sale for Medicinal Purposes.*—The question as to whether or not a sale of intoxicating liquor was made for medicinal purposes, is one for the jury trying the case. *Ib.*

MALICIOUS TRESPASS.

See CRIMINAL LAW, 51 to 53; FALSE IMPRISONMENT, 4.

MANDATE.

See APPEAL BOND; FEES AND SALARIES, 1; TAXES, 1.

MARION CRIMINAL CIRCUIT COURT.

See FEES AND SALARIES, 1.

MARRIED WOMAN.

See ESTOPPEL, 1; HUSBAND AND WIFE; REVIEW OF JUDGMENT; VENDOR'S LIEN.

MAYOR.

See RAILROAD, 1.

MEASURE OF DAMAGES.

See CONVEYANCE, 1; COVENANT, 1; FALSE IMPRISONMENT, 2, 8; TRESPASS, 2.

MECHANIC'S LIEN.

Defence.—Pleading.—Payment.—Fraud.—In an action by a mechanic to enforce a lien for the value of labor performed by him for the contractor in the erection of a building for the defendant, the latter answered, alleging, that, at the time the notice of such intended lien was filed, the contractor was solvent, and the plaintiff could have collected his claim of him, and that afterward the plaintiff had assisted the contractor to dispose of his property subject to execution, with intent to defraud the defendant, well knowing, that, prior to the recording of such notice, the defendant had paid the contractor in full.

Held, on demurrer, that the plaintiff's right to a lien is statutory, and that the answer is insufficient. *Andis v. Davis*, 17

MERGER.

See DECEDENTS' ESTATES, 8; JUDGMENT, 7, 8.

MESNE PROFITS.

See CONVEYANCE, 1; MORTGAGE, 13.

MINISTERIAL ACT.

See TAXES, 3.

MINUTES.

See CITY TREASURER, 11 to 13.

MISCONDUCT OF JURY.

See CRIMINAL LAW, 56, 57; PRACTICE, 22.

MISJOINDER OF ACTIONS.

See PROMISSORY NOTE, 6; SUPREME COURT, 2.

MISJOINDER OF PARTIES.

See PARTNERSHIP, 8; PROMISSORY NOTE, 6.

MISTAKE.

See GUARDIAN AND WARD, 16; HUSBAND AND WIFE, 6; MORTGAGE, 19; PROMISSORY NOTE, 23; SHERIFF'S SALE.

MONOPOLY.

See CRIMINAL LAW, 69.

MORTGAGE.

See CHATTEL MORTGAGE; COVENANT, 1, 2; FEES AND SALARIES, 2; HUSBAND AND WIFE, 6; PRACTICE, 13; PROMISSORY NOTE, 6, 11, 24, 25; SPECIFIC PERFORMANCE; SUPREME COURT, 17.

1. *Mistake.—Reformation of Description.—Pleading.—Husband and Wife.*—A mistake in the description of lands intended to be mortgaged by a husband and wife may be corrected in an action therefor against them. *McKay v. Wakefield*, 27
2. *Same.—Death of Party.—New Parties.—Heir.*—Where, prior to such action, the husband, being the owner of such lands, dies, his heirs should be joined with the widow as defendants. *Ib.*

3. *Foreclosure Against Subsequent Purchaser.—Notice.—Recording Mortgage.*—In an action to foreclose a mortgage on real estate, and to recover a personal judgment for the amount of the mortgage debt, against a subsequent purchaser of the mortgaged premises, who is alleged in the complaint to have assumed the payment of the mortgage debt as part of the purchase-money, it is not necessary to aver that such mortgage was ever recorded. *Scarry v. Eldridge, 44*
4. *Same.—Identifying Mortgage Assumed.*—Where the averments of the complaint clearly identify the mortgage assumed by the defendant as the mortgage in suit, the fact that the defendant assumed the same as being payable to only one of several persons for whose use it was in fact payable, as appears from the complaint, does not render it insufficient. *Ib.*
5. *Same.—Defect of Parties.*—In an action to foreclose a mortgage on real estate, against the last of several subsequent purchasers, each of whom, in receiving a conveyance of the land in fee-simple, had assumed the payment of the mortgage debt as part of the purchase-money, such other purchasers are not necessary parties defendants. *Ib.*
6. *Same.—Evidence.—Record of Conveyance.*—The record of the deed to such defendant for the mortgaged premises is competent evidence of the delivery to him of such deed. *Ib.*
7. *Same.—Indemnity Mortgage.*—Where the mortgage in suit was executed to indemnify the mortgagee against loss by reason of another mortgage, which was a lien upon another tract of land conveyed to the plaintiff by the mortgagor, an objection to admitting the latter mortgage in evidence, on the ground that the record thereof had not been satisfied, admits that it had been recorded, and that the defendant had notice of it. *Ib.*
8. *Same.—Deed to Plaintiff.*—The said deed from such mortgagor to the plaintiff for the latter mentioned tract of land is competent evidence against the defendant. *Ib.*
9. *Same.—Witness.—Husband and Wife.*—Where such mortgage was executed for the use of a husband and wife, he is a competent witness in his own behalf, in a joint action by them to foreclose the same, though such deed of conveyance was made to her alone. *Ib.*
10. *Same.—Harmless Evidence.*—The introduction in evidence of the deed from the mortgagor for the mortgaged premises, to the defendant's grantor, and of the record of the foreclosure of the mortgage for which the one in suit was given as an indemnity, though probably unnecessary, was not harmful. *Ib.*
11. *Mortgaging same Land, on same Day, to Different Persons.—Priority.*—Separate mortgages upon the same real estate, executed by the mortgagor, to several mortgagees, upon the same day, to secure the payment of debts having no priority, and recorded within time though upon different days, have no priority. *Cain v. Hanna, 408*
12. *Same.—Foreclosure Without Notice.—Sheriff's Sale.—Rights of Mortgagee having no Notice.—Redemption.—Purchaser May Pay off Mortgage.*—The foreclosure of one of such mortgages, without notice to the holder of the other, and the sale and conveyance of the mortgaged premises by a sheriff pursuant to such foreclosure, do not debar such holder from either foreclosing without redeeming or redeeming and foreclosing; but the purchaser under such sheriff's sale may pay off such mortgage and retain the premises. *Ib.*
13. *Same.—Tender of Redemption Money.—Mesne Profits.*—Such holder, in an action to redeem and foreclose, need not tender the redemption money before bringing his suit; but he can not cause the holder under such sheriff's sale to account for mesne profits. *Ib.*
14. *Purchaser for Valuable Consideration.—Pre-existing Debt.—Extension of*

- Payment.*—One who obtains the execution of a mortgage to secure the payment of a pre-existing debt, in consideration of an extension thereby made of the time of payment, is a purchaser for a valuable consideration. *Gilchrist v. Gough*, 576
15. *Mortgage Recorded after Time.—Notice.*—Though a mortgage be not recorded until after the time prescribed by law, yet the record thereof is notice to all purchasers or encumbrancers subsequent to the recording. *Ib.*
 16. *Same.—Extent of Notice.*—Such record is notice of its own contents, and of the existence of the mortgage of which it purports to be a record, but not of the contents of such mortgage. *Ib.*
 17. *Same.—Entry Book.—Case Overruled.*—The entry book kept by the recorder pursuant to section 29 of the act concerning the alienation of real property, etc., 1 R. S. 1876, p. 367, is notice of the exact time of reception, the names of the grantor and grantee, the description of the lands conveyed, the date and existence, but not of the contents, of a mortgage or other conveyance which has been entered therein and recorded. *Kessler v. The State, ex rel., etc.*, 24 Ind. 813, overruled. *Ib.*
 18. *Same.—Index.*—The index of mortgages and other conveyances, kept by the recorder pursuant to section 3 of the act prescribing his duties, etc., 1 R. S. 1876, p. 758, is not notice of the amount of the consideration of any such instrument, even though the index specify such amount. *Ib.*
 19. *Same.—Mistake of Record, as to Amount of Debt.—Priority.*—A mortgage on real estate was so entered in the entry book, and also indexed, as to show the true amount of the mortgage debt, but by a mistake in recording, made without the knowledge of the mortgagee, the record showed the amount of such debt to be much less than it really was. Subsequently the same land was mortgaged to one who had no actual knowledge of the existence of the prior mortgage.
Held, in an action for the foreclosure of the first mortgage, against the mortgagee of the second mortgage, that, except as to the amount of the first mortgage debt shown by the record, the second mortgage has priority over the first. *Ib.*

MURDER.

See CRIMINAL LAW, 10, 14, 15, 23, 24, 34 to 36, 66, 67.

NEGLIGENCE.

See GUARDIAN AND WARD, 16; RAILROAD, 3 to 5.

1. *Liability of Bank for Failure to Protest Promissory Note.—Pleading.*—A promissory note, payable in a bank of this State, was deposited, before maturity, with that bank, by a *bona fide* endorsee, for collection; but, on maturity of the note, which remained unpaid, the bank failed to protest the note and to notify the endorser of its non-payment, and within ninety days thereafter the maker was adjudged a bankrupt, whereupon the endorsee sued the bank for damages.
Held, on demurrer to the complaint, which alleged such facts and set out a copy of the note, that the complaint is sufficient.
Chapman v. McCrea, 360
2. *Wilful Injury.—Action for Damages.—Complaint.—Act of Agent, Employee, or Serrant.*—In an action by a passenger upon a steamboat, against a corporation owning and operating the same, to recover damages for injuries alleged to have been suffered by him while a passenger, through the negligence of the employees of the defendant, the complaint alleged, that the plaintiff had been "violently pushed, pulled and thrown through" a hatchway negligently left open by such employees, resulting in the injuries alleged.
Held, on demurrer, that the failure of the complaint to allege that such vio-

lence was the act of the defendant's employees renders it insufficient.

The Evansville, etc., Co. v. Wildman, 370

NEW TRIAL.

See CRIMINAL LAW, 7, 21, 22, 48, 56, 58; HIGHWAY, 11; INSTRUCTION TO JURY; PRACTICE, 5, 6, 7, 22; SUPREME COURT, 4, 6.

1. *Exception.—When Taken.*—An exception to the overruling of a motion for a new trial must be taken at the time such ruling is made, and the court can not allow time to take such exception. *Coan v. Grimes*, 21
2. *Asking Leave to Withdraw Motion.*—It is not error to refuse leave to withdraw a motion for a new trial, which has been overruled without any exception having been taken, to allow the same to be refiled. *Ib.*
3. *Evidence.—Witness.—Assignment of Error.*—Error in the admission of evidence, or in permitting one to testify as a witness, is proper ground for a motion for a new trial, but can not be independently assigned as error, in the Supreme Court on appeal. *Wright v. Miller*, 220
4. *Consent to a New Trial by Opposite Party.*—The consent of a party, that a new trial, moved for by the opposite party, may be granted, does not necessarily render erroneous the action of the court in overruling such motion. *Ib.*
5. *Same.—Record.*—A mere allegation of such consent, in the motion for a new trial, is not sufficient evidence to the Supreme Court, on appeal, that such party had actually consented that a new trial might be granted. *Ib.*
6. *Refusal of Trial by Jury.—Exception.*—Where a jury trial is demanded by a party, and refused by the court, the party demanding must, to make such refusal available as ground for a new trial, except at the time to such refusal. *Griffin v. Pate*, 278
7. *Form of Motion for.*—Where the form of a motion by a party for a new trial is general as to all of several parties opposing, but the grounds assigned therein relate to errors occurring as to a part only of such parties, it is not error to overrule the motion. *Kendel v. Judah*, 291
8. *Motion for.—Trial at One, and Finding at Next, Term.—Bill of Exceptions.—Evidence.*—Where a cause has been submitted for trial, and the evidence heard, and the court takes the matter under consideration until the next term of court, the party questioning the finding then announced may, at that term, properly make a motion for a new trial, on the ground that the finding is contrary to law or not supported by sufficient evidence, and file his bill of exceptions, embodying the evidence and setting out his exception to the overruling of such motion. *Ib.*
9. *Assignment of Error.—Evidence.—Instruction.—Verdict.*—The allegations that a verdict is contrary to law and is not sustained by sufficient evidence, and alleged error in admitting or excluding evidence, or in giving an instruction to the jury, are causes for a new trial, and are not proper assignments of error in the Supreme Court. *Marsh v. Terrell*, 368
10. *Causes.—Motion.*—A motion for a new trial must specify clearly and particularly the ground of the motion. *Ib.*
11. *Harmless Error.*—Evidence which, though possibly erroneous, is harmless, is not sufficient ground for a new trial. *Ohm v. Yung*, 432

NOTICE.

See ATTACHMENT, 4; CITIES AND TOWNS, 5; CONVEYANCE, 2; COUNTY COMMISSIONERS, 4; DECEDENTS' ESTATES, 2; HIGHWAY, 1. 8; INSURANCE; LANDLORD AND TENANT, 2, 3; MORTGAGE, 3, 12, 15 to 19; SUPREME COURT, 10, 17.

NUNC PRO TUNC ENTRY.

See PARTITION, 4; SUPREME COURT, 3.

OPEN AND CLOSE.

See PROMISSORY NOTE, 7.

PARTIES.

See ATTACHMENT, 5; COMMON SCHOOLS, 1; GUARDIAN AND WARD, 13, 14, 15; HUSBAND AND WIFE, 6; JUDGMENT, 3; MORTGAGE, 2, 5; PARTNERSHIP, 2, 8; PRACTICE, 8, 9; PROMISSORY NOTE, 6, 18; SHERIFF'S SALE; SUPREME COURT, 10, 17.

PARTITION.

See ESTOPPEL; HUSBAND AND WIFE, 8; PRACTICE, 13.

1. *Advancement.—Counter-Claim.—Supplemental Pleading.—Death of Party.—Descents.*—In an action for the partition of the lands of an intestate, brought by his widow and some of his children, against the other children, wherein the defendants were charged with advancements in full of their interests in such lands, the defendants filed what they called a supplemental paragraph "of answer," alleging the death of one of such co-plaintiffs, without issue, since the commencement of the action, and asking that that fact be considered in making the partition.
Held, on demurrer, that the so-called paragraph of answer was not an answer, but a counter-claim, and was sufficient. *Harness v. Harness*, 1
2. *Same.—Judgment.—Decree.*—A decree of partition in such action, setting off a portion of the lands to such deceased child, and awarding nothing to the defendants, though the evidence established the facts alleged in the counter-claim, was a nullity. *Ib.*
3. *Action can not be Dismissed after Finding Announced.—Practice.*—It is too late to dismiss an action for partition, over the objection of the defendant, after the finding of the court has been announced.
Ranales v. Randles, 93
4. *Report of Commissioners.—Correcting Misdescription.—Amendment.—Nunc pro tunc Entry.*—Commissioners to make partition of lands may, in their report, correct any misdescription thereof contained in the pleadings, interlocutory order for partition, or the warrant to the commissioners; and, in such case, it is not error in the court to direct corresponding amendments to be made; and the fact that the court erroneously styles such direction as an order for a *nunc pro tunc* entry, does not vitiate the order. *Ib.*
5. *Same.—Supreme Court.—Pleading.*—Such an amendment of the pleadings will be deemed by the Supreme Court, on appeal, to have been made below. *Ib.*
6. *Same.—Objections to Commissioners' Report.*—The action of the court in overruling an objection to the report of commissioners making partition, made on the ground of alleged inequality in the partition and based merely upon the affidavits of the parties objecting, will not be disturbed by the Supreme Court, on appeal. *Ib.*

PARTNERSHIP.

See CONTRACT; PROMISSORY NOTE, 5, 12.

1. *Witness.—Action by Surviving Partner.*—The defendant in an action by a surviving partner on a partnership chose in action is a competent witness in his own behalf. *Nicklaus v. Dahn*, 87
2. *Same.—Administrator of Deceased Partner not a Proper Co-Plaintiff.*—The administrator of the estate of the deceased partner is neither a necessary nor proper party plaintiff, and the plaintiff can not, by making such administrator a co-plaintiff, deprive defendant of his right to testify. *Ib.*
3. *Same.—Misjoinder of Parties.—Waiver.—Decedents' Estates.—Judgment.*

—No judgment, either for or against such estate, can properly be rendered in such action, but such misjoinder of the administrator is waived by a failure to object thereto. *Ib.*

PATENT-RIGHTS.

See CASES DOUBTED, EXPLAINED, MODIFIED OR OVERRULED, 4.

PAYMENT.

See GUARDIAN AND WARD, 1 to 8, 17; MECHANIC'S LIEN; PROMISSORY NOTE, 5.

PERJURY.

See CRIMINAL LAW, 50.

PETITION FOR REHEARING.

See JUDGMENT, 5.

PLEADING.

See CITIES AND TOWNS, 5 to 9; CITY TREASURER, 1, 2, 10, 12, 13; CONTRACT; CONVEYANCE, 1; CORPORATION, 2, 7, 8; COUNTY COMMISSIONERS, 2 to 5; COVENANT, 8, 4; ESTOPPEL, 1, 2; FALSE IMPRISONMENT, 4; GUARDIAN AND WARD, 9 to 11, 16; HIGHWAY, 1; HUSBAND AND WIFE, 3; MECHANIC'S LIEN; MORTGAGE, 1, 3, 4; NEGLIGENCE, 1, 2; PARTITION, 1, 4, 5; PRACTICE, 1, 3, 4, 6, 8, 9, 10 to 16; PROMISSORY NOTE, 1, 4, 13, 14, 16, 18, 22, 23; RAILROAD, 1, 4; REVIEW OF JUDGMENT; SHERIFF, 1, 2; SHERIFF'S SALE; SPECIFIC PERFORMANCE; STATUTE OF LIMITATIONS, 2, 3, 5; SUPREME COURT, 5; TAXES, 1; TRESPASS, 1.

1. *Practice.—Harmless Error.*—The sustaining of a demurrer to a paragraph of a pleading is harmless, when the matters alleged therein are admissible in evidence under a remaining paragraph. *May v. Pavey*, 4
2. *Same.—Harmless Ruling on Demurrer.*—Where the facts alleged in a special paragraph of answer are admissible in evidence under the general denial, which is also pleaded, the sustaining of a demurrer to the former is harmless. *Alvord v. Smith*, 58
3. *Practice.—Demurrer.*—A demurrer to the whole of a complaint consisting of several paragraphs should be overruled, if any one of the paragraphs be sufficient. *Board of Comm'rs, etc., v. Verbag*, 107
4. *Uncertainty.—Demurrer.—Practice.*—Uncertainty in a pleading which states sufficient facts can be reached only by a motion to make certain and not by demurrer. *City of Goshen v. Kern*, 468
5. *Justice of the Peace.*—A complaint before a justice of the peace, which states facts sufficient to inform the defendant of the nature of the action and to authorize a judgment which will bar another action for the same cause, is sufficient. *Ib.*
6. *Set-Off.—Tort.*—A claim arising out of a tort can not be pleaded as a set-off to an action on account. *ZeigelmueUer v. Seamer*, 488

POLICE REGULATION.

See CITIES AND TOWNS, 11; CRIMINAL LAW, 68.

POSSE COMITATUS.

See FALSE IMPRISONMENT, 4.

POSSESSION.

See RAILROAD, 2.

PRACTICE.

See CONVEYANCE, 1, CRIMINAL LAW, 7, 26, 27, 38, 48, 72; DECEDENTS'

ESTATES, 3; HIGHWAY, 2 to 5, 7, 9, 11; LIQUOR LAW, 4; NEW TRIAL; PARTITION, 3, 4, 6; PLEADING, 1 to 4; PROMISSORY NOTE, 7, 14; REVIEW OF JUDGMENT; SUPREME COURT, 4, 5, 9, 16; TRESPASS, 4.

1. *Withdrawal of Appearance Withdraws Pleading.*—Where a defendant who has been served with process withdraws his appearance, he thereby withdraws his answer also, and should be defaulted; and in such case, on appeal to the Supreme Court, the record must show the issue and service of process upon him, or judgment against him will be reversed.
Young v. Dickey, 31
2. *Same.—Appearance Without Process.*—It is within the discretion of the court, on objection by the plaintiff, to refuse leave to a defendant, who has appeared without service of process, to withdraw his appearance.
Ib.
3. *Demurrer Carried Back.*—The sufficiency of an answer is questioned by a demurrer questioning the sufficiency of a reply thereto.
Unfried v. Heberer, 67
4. *Pleading Struck Out.—Bill of Exceptions.*—A pleading struck out on motion must be made part of the record by a bill of exceptions, to present any question as to such ruling, to the Supreme Court on appeal.
Craig v. Ensey, 140
5. *New Trial.—Evidence.—Erroneous Judgment.*—Questions arising upon the admission or exclusion of evidence, and the alleged rendition of judgment for the wrong party, are grounds for a new trial, but are not proper assignments of error.
Ib.
6. *Refusal to Dismiss Action.*—A refusal to dismiss an action on account of the insufficiency of the complaint is not ground for a new trial, but is a proper assignment of error.
Ib.
7. *Motion for a New Trial.*—A motion for a new trial on the ground of the exclusion of evidence offered must clearly identify such evidence.
Ib.
8. *Witness.—Default.—Answer struck out.*—Where one of several defendants, who has been subpoenaed as a witness on behalf of the plaintiff, refuses to appear and testify on the trial, the court may order that his answer be struck out, and that he be defaulted.
Nelson v. Neely, 194
9. *Same.—Joint Answer.*—In such case a joint answer by him and a codefendant may be struck out, so far as the former is concerned.
Ib.
10. *Effect of Exception to Conclusions of Law.*—An exception to the conclusions of law admits that the facts have been fully and correctly found.
Hartman v. Aveline, 344
11. *Dismissal of Complaint does not Carry Counter-Claim with it.*—The dismissal of the complaint in an action, on the motion of the plaintiff, can not, over the objection of the defendant, carry with it a counter-claim filed by the latter.
Egolf v. Bryant, 365
12. *Same.—Bill of Exceptions.*—A bill of exceptions is not necessary to reserve an exception to the dismissal of a counter-claim.
Ib.
13. *Same.—Complaint for Partition.—Counter-Claim to Foreclose Mortgage.*—A cross complaint, so-called, for the foreclosure of a mortgage on real estate, filed by a defendant in an action for the partition of such real estate, is properly a counter-claim.
Ib.
14. *Amendment of Answer to which Demurrer was Sustained.—Waiver.*—A demurrer questioning the sufficiency of an answer consisting of a single paragraph having been sustained, the defendant, by leave of court, filed what he termed a second paragraph of answer, under which all the facts averred in his first answer were admissible in evidence.

Held, that, by so amending, error in sustaining such demurrer was waived, or rendered harmless. *DeArmond v. Stoneman*, 386

15. *Reply, Specially Denying Averments of Answer, Admissible under General Denial.*—Where, to an affirmative answer, a reply is filed, consisting of the general denial and a paragraph specially denying each material allegation of the answer, the facts averred in the special plea are admissible in evidence under the general denial; and therefore the defendant is not injured by the overruling of a demurrer questioning the sufficiency of the special plea. *Ib.*

16. *Striking out Pleading.*—Error in striking out a paragraph of a pleading is harmless, where the facts therein alleged are admissible in evidence under a remaining paragraph. *Noah v. Angle*, 425

17. *Judgment Non Obstante.—Verdict—Special Findings.*—Judgment on the special findings of a jury, notwithstanding their general verdict, can be rendered only when the former are inconsistent with the latter. *Ohm v. Yung*, 432

18. *Venire de Novo.—Verdict.*—A venire de novo is only awarded when the verdict is uncertain, or fails to find upon all the issues, or to assess damages. *Hershman v. Hershman*, 451

19. *Same.—Special Verdict.*—Where both a general and special verdict is found, and the former finds, though only inferentially, upon all the issues, it is not necessary to the validity of the latter that it find upon the whole case. *Ib.*

20. *Same.—Form of Verdict.—Failure to Instruct Jury.*—Where, in such case, the jury has not been instructed as to the form of their verdict, the joinder of their general and special verdict does not invalidate either. *Ib.*

21. *Same.—Judgment non Obstante.*—Judgment on the special verdict, notwithstanding the general verdict, can be had only where the former is repugnant to the latter. *Ib.*

22. *Separation of Jury Without Answering Interrogatories.—Venire de Novo.—New Trial.*—A jury to whom certain interrogatories had been submitted, to be answered in case they found a general verdict, was directed by the court, with the consent of the parties, that, if they agreed upon a verdict during the adjournment of court, they might seal it up and separate until the calling of court, whereupon the jury, having agreed upon a general verdict during adjournment, sealed it up and separated without answering the interrogatories. Upon the calling of court such verdict was returned by them into court, but, upon objection by a party to receiving said verdict, it was returned to the jury by the court with instructions to retire and answer the interrogatories, to which such party objected and excepted. The jury, after consultation, returned into court the same general verdict, with answers to the interrogatories, which the court, over the objection and exception of such party, received and ordered to be filed, and discharged the jury.

Held, that the action of the court was proper, and that such separation of the jury was not ground for either a venire de novo or a new trial.

Held, also, that, upon the second consultation of the jury, the whole case was before them, but that it was not error in the court to refuse to so instruct them. *Rush v. Pedigo*, 479

23. *Motion to Set Aside Default.*—A judgment rendered against a defendant by default, on his failure to appear, will not be set aside to allow proof of a set-off arising out of a tort, though the motion therefor allege a sufficient excuse for the failure to appear. *Zeigelmüller v. Seamer*, 488

24. *Order of Admitting Evidence.—Judicial Discretion.*—It is within the dis-

cretion of the court, in a proper case, to allow a party to introduce original evidence after the hearing of evidence has closed.

Holmes v. Hinkle, 518

PREMIUM.

Gaming.—Horse-Racing.—A premium offered by an authorized corporation or a private partnership to the owner of the horse that shall "make the best and quickest time," or exhibit a certain rate of speed, in a proposed trial of the speed of horses, to be had in a proper place, is not a bet or wager, is not unlawful or against public policy, and may be collected in an action by the owner of the horse which "makes" such "time" or exhibits such speed.

Alvord v. Smith, 58

PRESUMPTION.

See CITIES AND TOWNS, 7; CITY TREASURER, 8; CRIMINAL LAW, 21, 22, 35; GUARDIAN AND WARD, 5; HUSBAND AND WIFE, 5; PROMISSORY NOTE, 2, 3

PRINCIPAL AND AGENT.

See CITY TREASURER, 7, 8, 9; FEES AND SALARIES, 2; GUARDIAN AND WARD, 4 to 6; NEGLIGENCE, 2; PROMISSORY NOTE, 12, 19 to 21.

PRINCIPAL AND SURETY.

See CONTEMPT, 1; DECEDENTS' ESTATES, 4; GUARDIAN AND WARD, 9, 10, 14, 20.

Promissory Note.—Answer of Suretyship, and Extension of Time.—Notice of Suretyship.—Contract.—Where suretyship is not apparent on the face of the note, and notice thereof to the plaintiff is not averred, an answer by one of several makers of a promissory note, in an action thereon, alleging himself to be merely surety for his co-makers, and that the plaintiff had extended the time of payment of such note, pursuant to a valid contract therefor between himself and such co-makers, is insufficient.

Davenport v. King, 64

PRIORITY.

See CHATTEL MORTGAGE, 1; DECEDENTS' ESTATES; MORTGAGE, 11, 19; PROMISSORY NOTE, 24, 25.

PROCESS.

See COUNTY COMMISSIONERS, 1; HIGHWAY, 8; MORTGAGE, 12; PRACTICE 1, 2, 4; MORTGAGE, 12; PRACTICE, 1, 2.

PROHIBITION, WRIT OF.

See CITIES AND TOWNS, 1, 2.

PROMISSORY NOTE.

See ATTACHMENT, 4; CHATTEL MORTGAGE, 2; NEGLIGENCE, 1; SUPREME COURT, 17; VENDOR'S LIEN.

1. *Reference to Conditions of Another Writing.—Complaint.—Copy.*—A promissory note upon which suit was brought, and which was alleged in the complaint to be due and unpaid, contained a stipulation that it was "subject to certain conditions contained in a written agreement" between the parties, bearing the same date as the note.

Held, on demurrer, that such agreement ought to have been made part of the complaint by copy.

Held, also, the complaint containing no averment concerning such agreement or its conditions, that it is insufficient.

Titlow v. Hubbard, 6

2. *Presumption as to Place of Execution.*—Where suit is brought upon a promissory note in a court of this State, it will be presumed, the contrary not appearing, that the note was executed in the State.

Clark v. Carey, 105

3. *Presumption as to Locality of Bank.*—If such note be payable in a bank,

the locality of which is not designated, it will be presumed that such bank is located in this State. *Ib.*

4. *Same.—Answer.—Accommodation Endorser.*—An answer, in such action, by an endorser in blank, that he was merely an accommodation endorser and not a maker of the note, is insufficient. *Ib.*

5. *Note Executed by one Partner, in Name of Co-partner.—Judgment Non Obstante.—Interrogatories.—Payment.*—In an action against A., B. and C., as makers, on a promissory note purporting on its face to have been executed by A., in the individual names of A., B. and C., wherein B. and C. answered by a verified denial, the jury, with their general verdict against A., and in favor of B. and C., found specially, in answer to interrogatories, that A., B., C. and D. were partners at the time the note was executed; that D. was a resident of another State and unknown to the payee as a partner; that the note in suit was executed for personal property sold, and money loaned, by the payee to A., for the partnership, in the regular course of the partnership business; and that such property and money had passed into the partnership fund.

Held, that, as to B. and C., the answers to the interrogatories are inconsistent with and control the general verdict, and that judgment should be rendered against them.

Held, also, there being no plea of payment, that it was not necessary, to warrant such a judgment, that the jury should have found specially that the note was unpaid. *Nelson v. Neely*, 194

6. *Payable in Bank.—Foreclosure of Mortgage.—Misjoinder of Actions or Parties.—Supreme Court*—Complaint by an assignee, against the maker and assignor, upon a promissory note payable in bank, and to foreclose a mortgage executed by the assignor, to the assignee, to secure payment of the note.

Held, that there was no misjoinder of parties defendants, nor of causes of action.

Held, also, that the Supreme Court will not reverse a judgment for misjoinder of causes of action. *Pate v. First Nat'l Bank, etc.*, 254

7. *Non Est Factum.—Open and Close.*—Where the execution of a promissory note in suit is denied under oath, the burden of proof is on the plaintiff, and he has the right to the open and close. *Ib.*

8. *Same.—Putting Note in Evidence.*—The note in such case should be admitted in evidence on behalf of the plaintiff, upon his introducing any evidence, however slight, of its execution; and the defendant has no right to introduce evidence denying its execution, until the plaintiff has concluded his evidence in chief. *Ib.*

9. *Same.—Rebuttal.*—The plaintiff in such case has the right to the close, upon the conclusion of the defendant's evidence, though his rebutting evidence may include a portion of his evidence already given in chief. *Ib.*

10. *Same.—Rebutting Evidence.*—The defendant in such case can not complain of the introduction, by the plaintiff, of new matter, in rebuttal, where he himself is, in turn, allowed to rebut such new matter. *Ib.*

11. *Putting Mortgage in Evidence.*—In an action by an assignee against the maker and assignor, on a promissory note, and to foreclose a mortgage executed by the assignor, to secure payment of the note, the plaintiff has a right to introduce the mortgage in evidence, though the mortgagor has made default, and the maker only, under a denial of the execution of the note, is contesting the action. *Ib.*

12. *Execution of Note by One, in Name of Another.—Instruction.*—In an action against A., on a promissory note executed by B. in the name of himself and A., in renewal of a prior joint note executed by them, the court instructed the jury, that if, from the evidence, they believed that A. and B. had been carrying the note alleged to have been renewed, and that A. had informed the payee's agent, that, if it became necessary to renew

the note, B. had authority to execute the renewal in the name of both A. and B., and that the note in suit had been so executed prior to any revocation of such authority, A. was bound thereby.

Held, on evidence tending to show such a state of facts, that the instruction is correct. *Ib.*

13. *Complaint by Assignee in Justice's Court.—Defect of Parties.*—In an action originating before a justice of the peace, by an assignee, against the maker, on a promissory note, the complaint alleged that the note in suit had been assigned to the plaintiff "in writing," and that copies of both the note and assignment were attached to the complaint, as parts thereof, but in fact no copy of the assignment was so attached.

Held, on demurrer, for failure to make the payee a party defendant, that the complaint is insufficient; as, even in a justice's court, the payee must be made a party defendant in such an action, unless the assignment be by endorsement upon the note. *Reed v. Finton*, 288

14. *Action before Justice of the Peace.—Pleading.—Supreme Court.*—On appeal to the Supreme Court, in an action on a promissory note, commenced before a justice of the peace, wherein the note itself was the only cause of action filed, the record contained copies of the note only as they were set out in the justice's transcript and the bill of exceptions containing the evidence.

Held, that an objection, that no cause of action was on file in the circuit court, can not be made for the first time in the Supreme Court.

Tucker v. Gardiner, 299

15. *Same.—Failure of Justice to Transmit Note.—Motion to Dismiss Action.*—Where, on appeal of such action to the circuit court, the justice fails to transmit the note with the transcript, the proper practice for the defendant is to move to dismiss the suit for want of a cause of action. *Ib.*

16. *Same.—Cause of Action.*—The note itself is a sufficient cause of action in such a suit. *Ib.*

17. *Sale.—Title to Chattel.—Assignment.—Replevin.*—The endorsement in blank of a promissory note which stipulates that a certain chattel, therein described, shall remain the property of the payee until the note has been paid, does not, of itself, vest the title to such chattel in the endorsee, so as to enable him to replevy such chattel, on demand, for non-payment of the note. *The Domestic S. M. Co. v. Arthurhultz*, 322

18. *College Endowment Fund.—Answer.—Infancy.—Fraud.—Evidence.*—In an action against the maker, on a promissory note executed to the trustees of a college, for the purpose of an endowment fund, and payable on condition that a specified sum should "be secured for" that purpose prior to a date named, wherein the complaint duly alleged that such sum had been fully secured within the time limited, the defendant answered alleging that a portion of such sum so secured consisted of promissory notes executed by infants, as the plaintiff well knew, with intent to defraud the defendant.

Held, on demurrer, that the answer is insufficient.

Held, also, that the facts alleged in such answer would not be admissible in evidence under the general denial.

Held, also, that the plaintiff, by producing promissory notes or other securities of apparently equal rank and value, to the amount specified, would thereby make out a *prima facie* case.

The Board of Trustees, etc., v. Anderson, 367

19. *Principal and Agent.—Signature.—Church Trustees.*—A promissory note in the usual form, "we promise to pay," etc., executed in the individual names of the makers, with the addition of the words "trustees of the," etc., "church," is the obligation of the makers individually and not of the church. *Hayes v. Matthews*, 412

20. *Same.—Alteration.—Erasure.*—The erasure of such addition is immaterial, and is no defence to an action against the makers individually. *Ib.*
21. *Same.—How Agent may Bind Principal.*—To avoid individual liability on the part of the agent on a promissory note executed by an authorized agent on behalf of his principal, the name of the latter must be both inserted in, and signed to, the note. *Ib.*
22. *Defence.—Parol Evidence.*—No defence to an unambiguous promissory note, involving the introduction of parol evidence, varying the terms and legal effect of the note, is sufficient. *Ib.*
23. *Interest.—Mistake.—Pleading.—Evidence.*—In an action on a promissory note stipulating for the payment of a specified sum, "with ten per cent.," the plaintiff is entitled to have interest computed at the rate of ten per cent., without either averment or proof of mistake. *Ohm v. Yung, 482*
24. *Priorities of Separate Notes Secured by same Mortgage.*—Several promissory notes, maturing successively and secured by the same mortgage on real estate, stand as so many successive mortgages, and have priority in the order in which they mature.
Peoples Savings Bank, etc., v. Finney, 460
25. *Same.—Extension of Time of Payment.*—The fact that the holder of the note first maturing grants to the mortgagor, upon a valuable consideration, an extension of time beyond the maturing of the succeeding notes, does not give the latter priority over the former. *Ib.*

PROSECUTING ATTORNEY.

See FEES AND SALARIES, 1.

PROTEST.

See NEGLIGENCE, 1.

PUBLIC POLICY.

See COUNTY COMMISSIONERS, 5; PREMIUM.

QUO WARRANTO.

See COMMON SCHOOLS, 1.

RAILROAD TICKET.

See CRIMINAL LAW, 68 to 70.

RAILROAD.

1. *Complaint before Mayor or Justice, for Killing Stock.—Defect Cured by Verdict.—Fence.*—In an action under the statute, before the mayor of a city, against a railroad company, for killing stock, the complaint alleged, that, "on," etc., "at a point in said county of * where said railway track was not securely fenced, and not at a public crossing nor within the limits of an incorporated town or city, said defendant, by her agents, * ran a train of cars over and against" the stock of the plaintiff, which was of a certain value, and killed it.
• *Held*, on assignments of error in the Supreme Court, questioning for the first time the sufficiency of the complaint, that it is good after verdict, in an action commenced before a mayor or justice of the peace, though it does not allege that the stock had entered upon the railroad at a point where it was not securely fenced.
The T., W. & W. R. W. Co. v. Stevens, 887
2. *Evidence.*—Proof of possession of the stock killed is *prima facie* evidence of ownership. *Ib.*
8. *Killing Stock.—Defence.—Contributory Negligence.*—Contributory neg-

ligence is no defence to an action under the statute, against a railroad company for killing stock at a point on its road not securely fenced.

The L., N. A. & C. R. W. Co. v. Cahill, 340.

4. *Same.—Stock Running at Large in Violation of City Ordinance.*—An answer in such action, that the plaintiff had negligently, or in violation of a city ordinance, allowed the stock killed to run at large within the limits of an incorporated city, and in the vicinity of the defendant's railroad, amounts only to an answer of contributory negligence, and is insufficient on demurrer. *Ib.*

5. *Same.—Degrees of Negligence.—Instruction.*—In an action against a railroad company, for the alleged negligent killing of stock belonging to the plaintiff, by the defendant's employees, the court instructed the jury that, to constitute contributory negligence on the part of the plaintiff, in allowing said stock to run at large, he must have knowingly suffered his stock to *habitually* run at large in the immediate vicinity of the place where it was killed; and that the plaintiff "can not recover, although he may have been guilty of *less* negligence" than the employees of the defendant.

Held, that the instruction was erroneous.

The J., M. & I. R. R. Co. v. Foster, 342

RATIFICATION.

See GUARDIAN AND WARD, 8.

REAL ESTATE, ACTION TO QUIET TITLE.

See HUSBAND AND WIFE, 3.

REAL ESTATE, ACTION TO RECOVER.

See COMMON SCHOOLS; CONVEYANCE.

RECORD.

See CRIMINAL LAW, 21, 31, 32; NEW TRIAL, 5; PRACTICE, 1; SUPREME COURT, 7, 16, 18.

RECORDING CONVEYANCE.

See MORTGAGE, 3, 11, 15 to 19.

REDEMPTION.

See CHATTEL MORTGAGE, 1; MORTGAGE, 12, 13.

REFORMING INSTRUMENT.

See HUSBAND AND WIFE, 6; MORTGAGE, 1, 19.

REFUNDING ILLEGAL TAXES.

See TAXES.

RELATOR.

See COMMON SCHOOLS, 1; GUARDIAN AND WARD, 13.

REMEDY.

See TAXES, 2.

REMITTITUR.

See LIQUOR LAW, 1.

REMONSTRANCE.

See HIGHWAY, 2, 9, 10.

RENTS.

See CONVEYANCE, 1; MORTGAGE, 13.

REPLEVIN.

See PROMISSORY NOTE, 17.

1. *Evidence*.—In replevin, evidence of ownership in the defendant may be given under the general denial. *May v. Pavey*, 4
2. *Costs*.—*Reducing Justice's Judgment, in Circuit Court*.—In an action before a justice of the peace, to replevy certain chattels, part only of which were found by the constable, judgment was rendered for the plaintiff for possession of the chattels found, and for ten dollars damages for those not found and for the unlawful detention. On appeal to the circuit court there was a verdict that the plaintiff was entitled to possession, that the chattels found were worth six dollars, and that those not found were worth four dollars. Judgment on the verdict, and for costs.
Held, that the defendant was entitled to recover his costs in the circuit court. *Polk v. Nickens*, 439

REPORT.

See CITY TREASURER, 14, 15.

RESCISSION.

See CONTRACT. •

REVIEWERS.

See HIGHWAY, 2.

REVIEW OF JUDGMENT.

Cross Complaint for Review.—*Fraudulent Conveyance*.—*Evidence*.—*Husband and Wife*.—*Demurrer*.—*Insufficiency of Complaint a Ground for Review*.—*Coverture*.—*Limitations*.—*Legal Disabilities*.—*Practice*.—*Sheriff's Sales*.—In an action by B., against A., G. and others, to review a judgment in favor of G., against A. and B., rendered in an action by G. against A. and B., to set aside certain alleged fraudulent conveyances made through J., by S., to A. and B., the wife and minor child of S., A. filed a cross complaint against G., alleging, that, in the action sought to be reviewed, G.'s complaint against A. and B. alleged, that the conveyances attacked had been made by S., to defraud G. in the collection of a debt in his favor against S., existing prior, and merged in a judgment subsequent, to the making of such conveyances, and that S., from and after the rendition of such judgment, had been "wholly insolvent;" that A., on her own behalf and as guardian *ad litem* of B., had filed a cross complaint against G., alleging that, in consideration of money advanced by A. to S., her husband, to pay off a debt owing by him, and in consideration of her joining with him in a conveyance of certain other lands, he had promised to procure the conveyance to her of the land in controversy; that, either by mistake or otherwise, but without her knowledge or consent, he had taken such conveyance in his own name; that thereupon, without any intention on her part to defraud his creditors, and without any knowledge of her husband's indebtedness, and solely to carry out his agreement with her, she and her husband made the conveyance complained of to J., and J., at her request, had made the conveyance complained of to A. and B.; and that, at the time of such conveyances, S. was solvent; that a demurrer to such cross complaint, for insufficiency, had been sustained, to which A. had excepted; that thereupon judgment was rendered, setting aside such conveyances and subjecting the land in controversy to sale on execution to satisfy G.'s judgment against S.; that said land had been sold, and a certificate of purchase issued, to G., by the sheriff; that A. was, at the time of such action by G., and now is, a married woman. Prayer, that the sheriff be enjoined from conveying to G., that the judgment against A. and B. be reviewed, that the demurrer to A.'s said cross complaint be overruled, and that the title to the land be quieted in A. and B. A.'s cross com-

plaint for review set out a transcript of the proceedings and judgment had in the action sought to be reviewed, which transcript, though not certified to by the clerk, was averred to be a full, true and complete copy thereof.

Held, on demurrer, that A.'s cross complaint for review is sufficient.

Held, also, that her cross complaint in the action sought to be reviewed was sufficient.

Held, also, that G.'s demurrer to A.'s cross complaint for review admitted the truth of the allegation that the transcript of the former action was full, true and complete.

Held, also, that, as A.'s cross complaint in the original action was not an answer to G.'s complaint, the demurrer to the former could not have been carried back and sustained to the latter.

Held, also, that the allegations of such cross complaint, seeking affirmative relief, could not have been given in evidence under the general denial, which was also pleaded by A.

Held, also, that the insufficiency of G.'s complaint was good ground for a review of the judgment, though no demurrer thereto was filed.

Held, also, that such complaint was insufficient.

Held, also, that the failure of A. to file her cross complaint for review, within three years after the rendition of the judgment sought to be reviewed, is avoided by the averment of her coverture as a legal disability.

Harlen v. Watson, 143

RIGHTS OF PROPERTY.

See HUSBAND AND WIFE, 5.

SALE.

See PROMISSORY NOTE, 17.

SEDUCTION.

See CRIMINAL LAW, 2 to 4.

SEIZIN.

See COVENANT, 4.

SET-OFF.

See CONTRACT; PLEADING, 6.

SHERIFF.

1. *Action on Bond, for Failure to Advertise and Sell.—Defence.—Attorney.*—In an action by an execution plaintiff, against a sheriff and his sureties, upon the sheriff's bond, for a failure of the sheriff to advertise and sell the property of the execution debtor, an answer, that the sheriff's failure to advertise and sell was pursuant to the direction of the plaintiff's attorney, is sufficient. *The State, ex rel., etc., v. Boyd*, 428

2. *Same.—Exemption from Execution.—Pleading.—Exhibit.*—The defendants in such action answered, that, when about to make a levy, the debtor, who was a resident householder of the State, had demanded three hundred dollars worth of property as exempt from execution, and presented his verified schedule of his property, and that an appraisement thereof showed it to be of a less value than three hundred dollars.

Held, on demurrer, that the answer is sufficient.

Held, also, that copies of such schedule and appraisement could not be made part of such answer by attaching them thereto. *Id.*

SHERIFF'S SALE.

See ESTOPPEL, 1; MORTGAGE, 12, REVIEW OF JUDGMENT; STATUTE OF LIMITATIONS, 1, 2.

Misdescription of Premises.—Complaint by Purchaser Against Judgment Defendant, to Recover Bid and Taxes.—Parties.—In an action by the purchaser of

land sold at sheriff's sale, against the judgment defendant, who was the owner of the land, the complaint alleged, that, at the request and for the use of the defendant, the plaintiff, a stranger to the judgment, had bid, and paid to the sheriff, a certain sum of money, for the land, and also taxes thereon, but that, on account of a misdescription of the land, made by the sheriff in levying on the land and advertising it for sale, the sale was void.

Held, on demurrer, that the complaint is sufficient to authorize a recovery of the money so paid.

Held, also, that the sheriff was not a necessary party defendant.

Coan v. Grimes, 21

SHORT-HAND REPORTER.

See CRIMINAL LAW, 29 to 32.

SPECIAL FINDING.

See GUARDIAN AND WARD, 19; PRACTICE, 10, 17 to 21; SUPREME COURT, 12.

SPECIAL VERDICT.

See PRACTICE, 19, 20.

SPECIFIC PERFORMANCE.

Complaint Against Widow and Heirs, to Enforce Performance of Ancestor's Contract.—Conveyance.—Mortgage.—Tender.—Demurrer Carried Back.

—A and B. executed a written contract, wherein the former, for a specified sum of money, agreed to convey a certain tract of land to the latter, by a "a good and sufficient deed;" and B. agreed therein to procure certain moneys and pay the same to A. as a part of the purchase-money, and to execute to A. a mortgage on a specified portion of such land, to secure the payment of the residue of such purchase-money; and all of such stipulations were to be performed on a day in the future, named in the contract B. having died subsequent to such day for performance, A. brought an action against the widow and heirs of B., to enforce specific performance of such contract, alleging in his complaint, that, on such day, he had executed and tendered to B. a "good and sufficient deed" for such land, and had demanded performance by B. of his stipulations, which the latter refused; that, subsequent to B.'s death, he had tendered the same deed to the defendants, and demanded of them the performance of B.'s stipulations, which they refused; that the same deed was brought into court for the defendants; that such land had remained in the possession of B. and the defendants ever since the execution, and pursuant to the terms, of such contract; and that such contract was executed as a settlement of an action then pending between A. and B., concerning the title to such land.

Held, on demurrer to the defendant's answer, that such tender to the defendants was insufficient, and that the demurrer should be carried back and sustained to the complaint.

Sowle v. Holdridge, 218

STATUTE CONSTRUED.

See CITY TREASURER, 4 to 6; GUARDIAN AND WARD, 18; HUSBAND AND WIFE, 1; JUDGMENT, 1; LANDLORD AND TENANT, 2 TOWNSHIP TRUSTEE, 2 to 4.

STATUTE OF LIMITATIONS.

See REVIEW OF JUDGMENT.

1. *Action to set aside Sheriff's Sale.—Fraudulent Conveyance.—Limitation of Six Years.*—An action to set aside, as fraudulent, a sheriff's sale of land and a subsequent conveyance of the same by the execution defendant to the purchaser at such sheriff's sale, is barred by the statute of limitations of six years.

Sidener v. Galbraith, 89

2. *Continuation of Action which has Failed.*—An action by a purchaser of land at a sheriff's sale, against a purchaser of the same land at a previous sheriff's sale, to set aside the first sale as fraudulent, having been finally determined against the plaintiff on account of a defect in his title, he subsequently purchased the same land at a third sheriff's sale, and, within five years from the determination, but more than six years from the commencement, of the first action, he commenced a suit against the same defendant and the judgment defendant, to set aside, as fraudulent, such first sheriff's sale and also a conveyance of the same land, made by such judgment defendant to his co-defendant after the commencement but before the determination of the first action.
- Held*, that the second action was not a continuation of the first action, within the meaning of section 218 of the code, and that an answer of the statute of limitations of six years is sufficient. *Ib.*
8. *Legal Disabilities.—When Pleaded.—Demurrer.*—Where a complaint shows upon its face that the action is barred by the statute of limitations, and also shows that the plaintiff is under no legal disability, it is insufficient on demurrer; but, where it does not affirmatively show that the plaintiff is under legal disability, such fact must be made to appear by answer. *Harlen v. Watson*, 143
4. *Decedents' Estates.—Claim.—Contract.—Infant.*—A claim was filed against the estate of a decedent, for ten years' continuous services, completed two years previous to the filing of the claim, rendered for the decedent, by the claimant, under a promise of compensation fixing no specified amount, the first half of which term of service was during the infancy of the claimant.
- Held*, that the claim was not barred by the statute. *Wright v. Miller*, 220
5. *Action on Account.—Decedents' Estates.*—In an action against a decedent's estate, upon an open account, the administrator answered, alleging that none of the causes of action had accrued within six years prior to either the death of the decedent or the filing of the complaint.
- Held*, on demurrer, that the answer is sufficient. *Huff v. Krause*, 396

STAY OF EXECUTION.

See GUARDIAN AND WARD, 21 ; SUPREME COURT, 13, 14.

STREETS, ALLEYS AND SIDEWALKS.

See CITIES AND TOWNS, 1 to 8.

SUBSCRIPTION.

See PROMISSORY NOTE, 18.

SUMMONS.

See PROCESS.

SUPERSEDEAS.

See SUPREME COURT, 13, 14.

SUPERVISOR.

See HIGHWAY, 1.

SUPREME COURT.

See BILL OF EXCEPTIONS, 2; CRIMINAL LAW, 7, 17, 21, 22, 31, 48, 55, 59; DECEDENTS' ESTATES, 4; HIGHWAY, 8; INSANE PERSON, 1; JUDGMENT, 5 ; LIQUOR LAW, 1, 4; NEW TRIAL, 3, 5, 9; PARTITION, 5, 6; PRACTICE, 1, 4; PROMISSORY NOTE, 6, 14.

1. *Bill of Exceptions.—Evidence.—Instructions.*—The Supreme Court, on appeal, will not consider the evidence nor the instructions to the jury, unless it affirmatively appear by the bill of exceptions that it contains all the evidence. *May v. Percy*, 4

2. *Misjoinder of Actions*.—The Supreme Court, on appeal, will not reverse a judgment on the ground of a misjoinder of causes of action in the complaint. *Coan v. Grimes*, 21
3. *Improper Amendment by nunc pro tunc Entry*.—*Certiorari*.—Where, upon the whole record, except that objected to, a judgment appealed from appears to be right, the Supreme court will affirm the judgment, though an improper amendment of the record be made by the court below, by a *nunc pro tunc* entry, over the objection of the party appealing. *Scarry v. Eldridge*, 44
4. *Newly-Discovered Evidence*.—*New Trial*.—Where the evidence given on the trial of a cause is not in the record, on appeal to the Supreme Court, no question is presented as to the overruling of a motion for a new trial, based upon the alleged ground of newly-discovered evidence. *Jackson v. Fowler*, 85
5. *Motion to Strike Out Surplusage*.—The Supreme Court, on appeal, will not reverse a judgment for mere error in overruling a motion to strike surplusage out of a pleading. *Randles v. Randles*, 98
6. *Evidence*.—*Instructions*.—*Assignment of Error*.—Error in admitting or excluding evidence, and in giving or refusing instructions to a jury, is cause for a new trial, and can not properly be assigned as error, in the Supreme Court. *Vandever v. Garshwiler*, 185
7. *Motion in Arrest*.—*Record*.—No question upon the ruling on a motion in arrest of judgment can be presented to the Supreme Court, where the record does not contain a motion therefor, assigning reasons. *Ib.*
8. *Weight of Evidence*.—The Supreme Court, on appeal, will not disturb the verdict of a jury upon the mere weight of evidence. *Woodrow v. McKinney*, 205
9. *Brief*.—*Waiver of Error Assigned*.—The failure of counsel to discuss, in his brief, errors assigned on behalf of the party for whom he appears, is deemed by the Supreme Court to be a waiver thereof. *Griffin v. Pate*, 273
10. *Notice of Appeal from Judgment for one of several Co-Parties*.—Where, in an action against several defendants, judgment, on separate demurrer to the complaint, is rendered in favor of one defendant, and, on trial, against the others, notice to the latter of an appeal by the plaintiff to the Supreme Court, from such judgment on demurrer, is not necessary. *Wilson v. Stewart*, 294
11. *Weight of Evidence*.—The Supreme Court will not disturb a finding on the mere weight of evidence. *Tucker v. Gardiner*, 299
12. *Assignment of Error*.—*Special Finding*.—Where an exception has been duly taken to the conclusions of law drawn by a court from its special finding of the facts in a cause, an assignment of error on appeal to the Supreme Court, which in legal effect, though informally, questions the correctness of such conclusions of law, is sufficient. *Hartman v. Aveline*, 344
13. *Appeal*.—*Bond*.—*Stay of Execution*.—*Supersedeas*.—An appeal will lie to the Supreme Court without filing an appeal bond, but such appeal will not stay execution. *Ruschaupt v. Carpenter*, 359
14. *Requiring New Bond, on Insolvency of Surety*.—Where the security on the bond given on appeal to the Supreme Court becomes worthless, that court may, on proper evidence of that fact, order a new bond to be filed within a reasonable time, and that, in default thereof, execution may issue. *Ib.*
15. *Weight of Evidence*.—The Supreme Court, on appeal, will not disturb a verdict on the mere weight of evidence. *Ib.*
16. *Trial on Complaint Containing an Insufficient Paragraph*.—*Verdict*.—

Record.—Where a demurrer has been overruled to an insufficient paragraph of a complaint, an exception reserved, and, upon trial, a general verdict found for the plaintiff, the Supreme Court, on appeal, will reverse a judgment upon the verdict, unless it appear by the record that trial was had, and such verdict found, upon some other and sufficient paragraph of the complaint. *The Evansville, etc., Co. v. Wildman*, 870

17. *Co-Parties.—Notice of Appeal.—Waiver.—Foreclosure of Mortgage.*—The payee of several promissory notes endorsed the note first maturing to A., the note next maturing to B., and retained those last maturing himself; A. brought suit against the payee and mortgagors for foreclosure; B. and the payee then jointly sued A. and the mortgagors for foreclosure; afterward, by order of court, the two causes were consolidated into one action, and the several statements of the causes of action in the respective complaints were ordered to "stand as the complaint in the consolidated action," and, without forming any issue, the mortgagors were defaulted, personal judgments on the notes rendered against them, and foreclosure decreed, giving priority to A., B. and the payee, in the order named; subsequently B. and the payee filed a cross complaint against A. only, for foreclosure of the same mortgage, asking priority over A., on the ground, that, for a good consideration, he had extended the time of payment of the note held by him; on the motion of B. and the payee, the original judgment was vacated, without any plea by A. other than a demurrer to such cross complaint, and without any notice to or appearance by the mortgagors, and the various actions were again consolidated, personal judgments again rendered on the notes, against the mortgagors, and foreclosure decreed, giving priority to B., the payee and A., in the order named.

Held, on appeal by A. to the Supreme Court, that the mortgagors were not co-parties with him, within the meaning of section 551 of the practice act.

Held, also, that, after the submission of such cause by agreement of parties, and after notice to the appellees that the cause had been distributed for decision, a motion by them to dismiss the appeal for want of notice thereof to the mortgagors should be overruled.

Peoples Savings Bank, etc., v. Finney, 460

18. *Affidavit to Set Aside Judgment.—Bill of Exceptions.*—An affidavit, supporting a motion to set aside a judgment, forms no part of the record of an appeal to the Supreme Court, unless embodied in a bill of exceptions.

Patton v. Camplin, 512

SURPLUSAGE.

See SUPREME COURT, 5.

TAXES.

1. *Lands Held by Indians.—Mandate to Refund Illegal Taxes.—County Commissioners.*—In an action by the State, on the relation of one claiming to be an Indian of a certain tribe holding lands reserved to them in this State pursuant to a treaty with the United States, or to compel a board of county commissioners by mandate to refund certain alleged illegal taxes assessed against such lands and collected from such Indians, the complaint failed to allege that such lands were reserved to such Indians, as a tribe or band, and not individually.

Held, on demurrer, that the complaint is insufficient.

Held, also, that, by section 10 of the act of December 21st, 1872, in relation to the assessment of taxes, 1 R. S. 1876, p. 72: lands in this State, reserved to or for any individual under any treaty between an Indian tribe and the United States, are taxable from the date of confirmation of such treaty.

The State, ex rel., etc., v. The Board, etc., 497

2. *Same.—Application to Commissioners to Refund.—Appeal.—Remedy.*—Where an application has been made to and refused by a board of commissioners under the provisions of the act of March 2d, 1853, 1 G. & H. 110,

for the refunding of taxes illegally assessed and collected, the remedy of the applicant is by appeal thence to the circuit court and not by mandate. *Ib.*

3. *Same.—Judicial Act.—Ministerial Act.*—The action of a board of commissioners upon such an application is a judicial, and not a ministerial act. *Ib.*

TENDER.

See HIGHWAY, 2; MORTGAGE, 13; SPECIFIC PERFORMANCE.

"TICKET SCALPER."

See CRIMINAL LAW, 68 to 70.

TIME.

See TRESPASS, 8.

TORT.

See PLEADING, 6.

TOWNSHIP TRUSTEE.

See HIGHWAY, 1.

1. *Eligibility.—Alien.*—A voter under the constitution of this State, though not a citizen of the United States, is eligible to the office of township trustee. *McCarthy v. Froelke*, 507
2. *Same.—Construction of Statute.—Township Elections.*—The act of March 12th, 1877, "limiting the eligibility to the office of township trustee," Acts 1877, Spec. Sess., p. 79, is not in conflict with the act of March 8d, 1877, providing "for township elections," Acts 1877, Reg. Sess., p. 58; and both acts should be construed as though the former act were an additional section of the latter. *Jeffries v. Rowe*, 592
3. *Same.—Contested Election.*—A township trustee who had held the office of township trustee for two consecutive terms immediately preceding the first Monday of April, 1878, was not eligible to re-election on that day, though his last term had not continued for the two years for which he had been elected. *Ib.*
4. *Same.*—The term "hereafter," as used in said act of March 12th, 1877, refers to and means the time after the taking effect of such act. *Ib.*

TRESPASS.

See CRIMINAL LAW, 6, 51 to 53; FALSE IMPRISONMENT; HIGHWAY; PLEADING, 6.

1. *Answer.—Husband and Wife.—Principal and Agent.—Attachment Suit before Justice of the Peace of Foreign State.—Law of Foreign State.—Jurisdiction.*—In an action for damages for the unlawful taking and conversion, in this State, of a chattel, the defendant answered, alleging, that, in the absence of the plaintiff, who had absconded he had taken possession of the chattel in this State, at the request of the plaintiff's wife, and that, while it was in his possession, in another State, the same was attached and sold in an action instituted by the defendant and other attaching creditors, against the plaintiff, before a justice of the peace of such State, a copy of which proceedings was made part of the answer.
Held, on demurrer, that the statute of the foreign State, authorizing suits in attachment, before a justice of the peace, should have been made part of the answer, that the authority of the wife to so deliver such chattel to him should have been averred, and that the answer is insufficient. *Baker v. Flint*, 187
2. *Evidence.—Damages.—Opinion of Witness.—Watercourse.*—The damages to be recovered for an alleged wrongful obstruction of a watercourse

forming the line between the lands of the parties can not be estimated by the mere opinion of a witness. *Noah v. Angle*, 425

8. *Same.—Time.—Evidence of Previous Tort.*—Where, in such case, the tort is alleged by the complaint to have been committed on a particular day, evidence of similar torts, previously committed, is inadmissible. *Ib.*

4. *Same.—Costs not Exceeding Damages.—Form of Motion.—Practice.*—The verdict in such case assessed the plaintiff's damages at one dollar, whereupon the defendant moved the court "for a judgment for all the costs in the case, except the sum of one dollar, against the plaintiff."

Held, that the motion was properly overruled.

Held, also, that the proper motion in such case is, "that the plaintiff recover no more costs than damages," etc. *Ib.*

TRIAL BY JURY.

See NEW TRIAL, 6.

UNCERTAINTY.

See CONVEYANCE, 1; PLEADING, 4.

USER.

See HIGHWAY, 10.

VENDOR'S LIEN.

Lands Conveyed to Purchaser's Wife.—Judgment.—Promissory Note.—The vendor of a tract of land, at the request of the purchaser, conveyed part thereof to the latter's wife and the residue to the purchaser, taking of the latter, for an unpaid balance of the purchase-money, his promissory note. Such note becoming due and remaining unpaid, the vendor obtained personal judgment thereon against the purchaser, and, the latter having died insolvent, the judgment plaintiff instituted an action to enforce a vendor's lien against the whole of such tract of land, for the amount of such judgment.

Held, on such facts, that the plaintiff is entitled to the lien sought.

Humphrey v. Thorn, 296

VENUE, CHANGE OF

See CRIMINAL LAW, 17, 87, 71.

VENIRE DE NOVO.

See CRIMINAL LAW, 26; PRACTICE, 18, 22.

VERDICT.

See CRIMINAL LAW, 25, 26, 40, 42, 57; NEW TRIAL, 9; PRACTICE, 17 to 22; RAILROAD, 1; SUPREME COURT, 16.

VERIFICATION.

See CORPORATION, 8.

VIEWERS.

See HIGHWAY, 2, 10.

VOTER.

See TOWNSHIP TRUSTEE, 1.

WAGER.

See PREMIUM.

WAIVER.

See HIGHWAY, 2, 9; PARTNERSHIP, 8; PRACTICE, 14; SUPREME COURT, 9, 17.

WATERCOURSE.

See TRESPASS, 2.

WATER-WORKS.

See CITY TREASURER, 4 to 14.

WEIGHT OF EVIDENCE.

See SUPREME COURT, 8, 11, 15; CAIN *v.* HANNA ET AL., 408. on page 411, of this volume.

WIDOW.

See ESTOPPEL, 1 ; HUSBAND AND WIFE, 1 to 4, 6 ; MORTGAGE, 2; SPECIFIC PERFORMANCE.

WITNESS.

See CRIMINAL LAW, 54, 55, 60; INSANE PERSON, 2; MORTGAGE, 9; NEW TRIAL, 8; PARTNERSHIP, 1; PRACTICE, 8; TRESPASS, 2.

WORDS AND PHRASES.

See CITIES AND TOWNS, 12; CORPORATION, 5; CRIMINAL LAW, 58; TOWNSHIP TRUSTEE, 4.

END OF VOL. LXIII.

ERRATA.—In *Stewart et al. v. Muse*, 62 Ind. 385, in the second paragraph of the syllabus, the words "by releasing the defendant" should read "by releasing the mortgagor."
 REPORTER.

Ex. & a. a.

